① Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

EMC CORPORATION,
Petitioner,
v.
JOAN H. BRAITSCH,
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a prevailing defendant in an employment discrimination case is entitled to an award of attorney's fees when, as here, the plaintiff's claims fail as a matter of law for reasons that were or should have been readily apparent to the plaintiff.

2. Whether the court of appeals erred in deciding this case in a manner that conflicts with decisions of the First, Seventh, and Eleventh Circuits which hold that prevailing defendants in civil rights cases are entitled to an award of attorney's fees even if only some of the plaintiffs' claims were frivolous.

PARTIES TO THE PROCEEDING

The caption contains the names of all of the parties to the proceeding in the court below. Thomas P. Aaron, Michael R. Grilli, and Frank M. Keaney were named as defendants at an earlier stage of the litigation, but all of respondents' claims against those individuals were dismissed as a matter of law by the district court, and those dismissals are now final and unappealable.

RULE 29.6 STATEMENT

Petitioner EMC Corporation is a publicly held corporation and has no parent corporation. No publicly held company owns more than 10 percent of EMC Corporation's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner EMC Corporation ("EMC") respectfully petitions the Court for issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-2a) is not reported, but the judgment is noted at 210 F.3d 360 (4th Cir. 2000) (Table). The orders of the United States District Court for the Eastern District of Virginia denying EMC's request for an award of attorney's fees (App., *infra*, 3a-6a, 10a-11a, 16a-17a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 2000. A timely petition for rehearing and rehearing *en banc* was denied on May 2, 2000. App., *infra*, 49a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The attorney's fees provision of Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, § 706(k), 78 Stat. 261, codified at 42 U.S.C. § 2000e-5(k), provides in pertinent part as follows: "In any action or proceeding under this title the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee."

The Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, § 2, 90 Stat. 2641, codified as amended at 42 U.S.C. § 1988(b), provides in pertinent part as follows: "In any action or proceeding to enforce a provision of section[] . . . 1985 . . . of [title

42], . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee."

STATEMENT OF THE CASE

A. Factual Background

EMC Corporation, a provider of computer data storage systems, hired two sales representatives for its Federal Division in 1990: Respondent, who is female, and Dean Monkelien, who is male. App., *infra,* 13a; C.A. Jt. App. 16 ¶ 15, 63, 64, 124 ¶ 21, 189, 276, 346, 411. Respondent and Monkelien received identical compensation packages and were required to meet the same sales quota. App., *infra,* 14a, 25a-26a, 29a-30a; C.A. Jt. App. 193 ¶ 40, 346-47, 358, 412-13.

Respondent failed to make her sales quota either in 1990 (her first year of employment) or in 1991. App., *infra,* 5a, 12a. In April 1991, EMC discharged Monkelien, who had been hired at approximately the same time as Respondent, for failing to meet his sales quota. App., *infra,* 12a, 26a; C.A. Jt. App. 65 ¶ 8, 70 ¶ 25, 124 ¶¶ 22-23. In November and December 1991, Respondent was reminded that she was not meeting her sales quota (C.A. Jt. App. 71 ¶¶ 28-29, 470-71), but she failed to remedy that deficiency. App., *infra,* 5a, 14a. On January 3, 1992, after failing to meet her sales quota for seven consecutive quarters—the entire period of her employment—Respondent was discharged for not making quota. C.A. Jt. App. 70 ¶ 25, 71 ¶ 30, 473. On the same day that Respondent was discharged, a male sales representative who had been working for EMC for only six months was also discharged for failing to meet his sales quota. App., *infra,* 14a n.*, 28a; C.A. Jt. App. 66 ¶ 10.

EMC subsequently hired a female sales representative as a replacement for Respondent. App., *in-*

fra, 4a, 40a; C.A. Jt. App. 72 ¶ 31. This female sales representative was paid at the same compensation level as the most highly compensated male sales representatives hired after Respondent. App., *infra*, 40a; C.A. Jt. App. 72 ¶¶ 31-32, 95, 347.

B. Administrative Proceedings

Respondent filed a complaint of gender discrimination against EMC with the Fairfax County Human Rights Commission ("the Commission") in June 1992. The Commission investigated Respondent's complaint and issued a detailed report in May 1994. App., *infra*, at 22a-42a. The Commission concluded that there "is insufficient evidence to support [Respondent's] allegations of sex discrimination against EMC Corporation." *Id.* at 41a. As the Commission explained, Respondent was "compensated on the same level as" the male employee who was hired with her. *Id.* at 26a. Moreover, while employees hired the following year received a higher base salary, the Commission found no evidence that this change in compensation was the result of gender bias. *Id.* at 28a-29a.

With regard to Respondent's discharge, the Commission found that "[i]t is clear from the evidence that [Respondent] and [a male employee who was discharged six months after being hired] were the worst performers in the office." *Id.* at 40a. Finally, the Commission found that Respondent was replaced by a female sales representative who received the same compensation as a male sales representative hired shortly thereafter. *Id.* Accordingly, the Commission concluded that Respondent's claim of sex discrimination was not supported by the evidence. *Id.* at 40a-41a.

C. Proceedings in the District Court

In December 1994, Respondent filed this action in the United States District Court for the Eastern District of Virginia, asserting claims for gender discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, the Equal Pay Act, 29 U.S.C. § 206(d), and the Civil Rights Enforcement Act of 1871, 42 U.S.C. § 1985(3). Respondent's Title VII and Equal Pay Act claims were asserted against both EMC itself and against her individual supervisors at EMC. The § 1985(3) claims were asserted only against the individual supervisors.

EMC moved to dismiss the Title VII and Equal Pay Act claims against the individual supervisors pursuant to well-established case law holding that such claims cannot be brought against individual employees of the plaintiff's former employer. C.A. Jt. App. 50-52. EMC also moved to dismiss the § 1985(3) claims on the ground that such claims cannot be brought to enforce rights created by Title VII. *Id.* at 52-54. The district court granted EMC's motion to dismiss these claims in February 1995. *Id.* at 56.

Shortly thereafter, EMC moved for summary judgment on Respondent's remaining claims. EMC pointed out that Respondent had no direct evidence of gender discrimination and no evidence of disparate treatment that would support a prima facie case of discrimination. C.A. Jt. App. 74-75. EMC also noted that even if Respondent could present a prima facie case of discrimination, EMC still would be entitled to judgment as a matter of law because it had presented a non-discriminatory reason for Respondent's termination (namely, her failure to meet her sales quota) and there was no evidence of pretext. *Id.*

EMC's motion for summary judgment was denied without prejudice. C.A. Jt. App. 160. The district court explained that "I'm not willing to grant summary judgment this early in the proceedings" and that "I just think it's unfair this early in the litigation . . . to require that summary judgment be imposed with affidavits." C.A. Jt. App. 150, 154. EMC renewed its motion for summary judgment shortly before trial (C.A. Jt. App. 10, entry 91) but the district court did not rule on the motion.

Respondent presented her evidence to a jury on July 31 and August 1, 1995. At the close of Respondent's case-in-chief, the district court granted EMC's motion for a directed verdict under FED. R. CIV. P. 50. App., *infra*, 18a. The court explained:

> [T]here is just no evidence to go forward on where any reasonable jury could find that there was discrimination based on sex. [A male sales representative] and this employee were hired at the same time and they were paid the same, they were both terminated because of performance. The people who were hired the following year were all paid the same, and the woman who was hired to replace this plaintiff was paid the same as those people they hired later. . . .

App., *infra*, 21a. The court concluded that "there is no evidence at all of discrimination because of sex." *Id.*; *see also id.* at 4a.

D. Respondent's Appeal

Respondent appealed, and the court of appeals affirmed. App., *infra*, 12a-15a. After reviewing the record, the court held that "[Respondent] failed to establish a prima facie case of employment discrimination on the basis of gender." *Id.* at 13a. Specifically, the court explained that Respondent had been paid the same amount as comparable men at EMC: "[D]espite the fact that [Respondent's] compensation package was less than employees (both male and female) hired in 1991 and later, [Respondent] admitted that she was hired at the same compensation package as the other employee hired in 1990 (a male)." *Id.* at 14a.

The court of appeals also noted that Respondent was discharged according to the same standards that were applied to men: Respondent "admitted that she failed to make sales quota in either 1990 (her first year of employment) or 1991—even by her own calculations—and that the male employee hired at the same time who also failed to make quota in either his first or second year was likewise terminated in his second year of sales." *Id.* at 14a. Finally, the court held that Respondent also failed to present evidence to "rebut the legitimate, nondiscriminatory reason EMC proffered to support its termination of [her]," namely, Respondent's "failure, after her second year of sales, to meet her sales quota." *Id.*

E. EMC's Claim for Attorney's Fees

In November 1995, during the pendency of Respondent's appeal, EMC filed a motion in the district court seeking an interim award of attorney's fees pursuant to the fee-shifting provision of Title VII, 42 U.S.C. § 2000e-5(k), and the Civil Rights Attorney's Fee Awards Act, 42 U.S.C. § 1988(b). The district court denied that motion. App., *infra*, 16a-17a.

In November 1996, after the court of appeals affirmed the dismissal of Respondent's claims, EMC moved the district court for an award of attorney's fees incurred by EMC in defending against Respondent's claims in the district court and on appeal. The district court again refused to award attorney's fees to EMC. App., *infra*, 10a-11a.

EMC appealed the denial of attorney's fees. The court of appeals vacated and remanded for "amplification of [the district court's] conclusion that [Respondent's] case was not frivolous, unreasonable, or without foundation." App., *infra*, 9a.

On remand, the district court again denied EMC's request for attorney's fees. The court held that Respondent did not "pursue[] this case in a frivolous or unreasonable manner," despite the fact that Respondent had "admitted that she was paid the same as the two salemen hired in her year in her division; she admitted that she never made her sales quotas . . .; she conceded that three of her male peers were also fired for failing to meet quota after having been afforded less time on the job than she had; she admitted that no EMC supervisors ever made any sexist remarks to her; and she was replaced with a woman." App., *infra*, 5a-6a.

The court of appeals affirmed. App., *infra*, 1a-2a. Notwithstanding EMC's showing that this case presents important legal issues concerning the appropriate standard for determining whether to award attorney's fees to prevailing defendants, and despite the fact that the denial of fees in this case creates a circuit conflict, the panel rejected EMC's arguments without analysis.

REASONS FOR GRANTING THE WRIT

The federal courts are plagued by an onslaught of meritless employment discrimination cases, yet the lower federal courts lack adequate instruction regarding their obligation to award attorney's fees to defendants who have been compelled to defend against baseless claims of discrimination. Absent clear guidance from this Court, Congress' goal of deterring groundless discrimination claims will continue to be frustrated, and the avalanche of meritless but costly "strike" suits will continue unabated.

The fundamental question presented by this petition is whether meaningful appellate review is available to effectuate the rights of prevailing defendants to obtain awards of attorney's fees as a deterrent to the prosecution of unreasonable, frivolous, or groundless employment discrimination lawsuits. The court of appeals below simply ignored the compelling justifications for awarding attorney's fees to the prevailing defendant in this case, and in so doing created a conflict with decisions of the First, Seventh, and Eleventh Circuits. This Court's review is warranted to resolve that conflict and to ensure that the clear congressional intent to discourage baseless employment discrimination lawsuits is not thwarted by the imposition of unduly steep hurdles to defendants' fee awards.

I. This Court Should Grant Review In Order To Make Clear That An Award Of Attorney's Fees Is Required When A Plaintiff's Claims Fail As A Matter Of Law For Reasons That Were Or Should Have Been Apparent To The Plaintiff

Under *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), and its progeny, an award of attorney's fees to a prevailing defendant in an employment discrimination case is appropriate if the plaintiff's claims were "frivolous, unreasonable, . . . groundless," or "without foundation." 434 U.S. at 421, 422.[1] Fee awards to prevailing defendants serve important policy goals recognized by Congress, such as deterring baseless litigation and ensuring that the fairness of the adversary process is not distorted "by giving the plaintiff a disproportionate advantage with regard to fee entitlement." *Independent Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 764 (1989); *Christiansburg*, 434 U.S. at 419-21.

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[1] *Christiansburg* involved the fee-shifting provision of Title VII, 42 U.S.C. § 2000e-5(k), but the *Christiansburg* standard also governs awards of attorney's fees to prevailing defendants under 42 U.S.C. § 1988. *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983); *Hutchinson v. Staton*, 994 F.2d 1076, 1080 n.2 (4th Cir. 1993).

Achievement of these congressional goals requires vigorous enforcement of defendants' rights to recover attorney's fees incurred in defending against groundless discrimination claims. Unfortunately, however, as currently applied by most federal district courts and courts of appeals, the fee-shifting provisions of Title VII and other federal statutes are not achieving these salutary goals. Indeed, the available data suggest that the problem of frivolous discrimination claims has grown considerably worse since 1991, when Congress added compensatory and punitive damages to the remedies available under Title VII. Between 1991 and 1998, the number of employment discrimination lawsuits filed in United States District Courts more than tripled. In 1991, such actions numbered 6,718. By 1998, that number had grown to 21,860. *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR, Table C-4 (1991, 1998). Employers are currently being confronted with an unprecedented barrage of discrimination claims.

While the district courts necessarily bear the brunt of this onslaught of litigation, the dockets of the federal courts of appeals have also become increasingly clogged with employment discrimination appeals, many of them frivolous. A review of recent appellate litigation in the court below, for example, reveals that the absence of clear guidelines for awarding attorney's fees to prevailing defendants has ill-served the congressional goal of "protect[ing] defendants from burdensome litigation having no legal or factual basis." *Christiansburg*, 434 U.S. at 420.

In the three years prior prior to the commencement of this appeal, the Fourth Circuit summarily rejected no fewer than 83 claims of employment discrimination for failure to satisfy the basic elements of a plaintiff's employment discrimination claim as set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). These 83 cases involved claims that in many instances should never have been brought, and that certainly should never have been appealed. In most of these cases, the plaintiff failed even to meet the minimal burden of establishing a prima facie case of discrimination under the *McDonnell Douglas/Burdine* test. App., *infra*, 43a-45a. In the remaining cases, the plaintiff was wholly unable to rebut the defendant's legitimate, nondiscriminatory explanation for its employment decision. App., *infra*, 46a-48a.

Against this backdrop, it is readily apparent that further guidance to the lower federal courts is required in order to provide them with the tools necessary to deter baseless employment discrimination lawsuits and thereby effectuate congressional intent. Thus, the lower courts must be reminded of their obligation to award attorney's fees to defendants who are forced to defend against frivolous, unreasonable, or baseless claims.

In particular, this Court should grant review in this case to make clear that the lower federal courts are not free to deny defendants their attorney's fees after having rejected employment discrimination claims as a matter of law, unless the court concludes that throughout the entire course of the litigation the plaintiff was justifiably unaware of the facts or legal principles that ultimately resulted in dismissal. When, as here, a plaintiff's case is determined to be wholly lacking in merit on grounds that were, or should have been, readily apparent to the plaintiff, the logic of *Christiansburg* dictates that an award of attorney's fees should be required. In particular, a plaintiff's inability to survive summary judgment or a directed verdict should compel an award of attorney's fees to the prevailing defendant unless the plaintiff can demonstrate that he or she was justifiably unaware of the underlying evidence or legal principles that required rejection of his or her claims. That is particularly true where, as here, the plaintiff fails to meet even the minimal burden of making out a prima facie case of employment discrimination.

In this case, Respondent's claims were rejected as a matter of law for reasons that were, or should have been, readily apparent to Respondent before she filed this lawsuit. Her conspiracy and discrimination claims against the individual defendants were barred by well-established Supreme Court and court of appeals precedent. *See* pp. 13-15, *infra*. Her employment discrimination claims against EMC were equally frivolous, both because she could not make out a prima facie case of discrimination and because she could not rebut EMC's non-discriminatory reason for her discharge. Pet. App. 4a, 5a-6a, 12a-15a, 19a-21a.

In addition, it is undisputed that, at the time she brought this suit, Respondent was well aware of the underlying facts that compelled rejection of her claims, because those facts had been fully aired in the administrative investigation, which culminated in a finding that her claims of discrimination were entirely without merit. Pet. App. 37a; *see generally id.* at 18a-38a. Thus, Respondent was on notice of the baseless nature of her claims, but she nonetheless chose to initiate and prosecute this lawsuit seeking millions of dollars in damages for alleged discrimination.

A fee award should be compelled in these circumstances, but the court of appeals refused to grant such an award, and failed even to offer any explanation or justification for its decision. If this type of judicial indifference to defendants' rights to receive fee awards is permitted to go unchecked, Congress' intent to deter frivolous employment discrimination and civil rights claims and create a fair adversary process in such cases will continue to be frustrated. This case provides an appropriate vehicle for this Court to clarify the standards that should govern fee awards to prevailing defendants, and certiorari should therefore be granted.

II. The Decision Below Conflicts With Case Law Holding That Prevailing Defendants Are Entitled To Fee Awards Even If Only Some Of The Claims Asserted By The Plaintiff Were Frivolous

Neither Respondent nor the court of appeals offered any justification for Respondent's assertion of claims under 42 U.S.C. § 1985(3) or for her assertion of employment discrimination claims against her individual supervisors—claims that were clearly barred by controlling precedent at all times relevant to this case. Under the settled law of several other circuits, that fact alone entitled EMC to an award of attorney's fees incurred in defending against those patently frivolous claims. The court of appeals' inexplicable refusal to award fees in these circumstances creates a square circuit conflict, and provides an additional basis for this Court's review.

As discussed above, an award of attorney's fees is appropriate under *Christiansburg* if a plaintiff's claim is "frivolous, unreasonable, or groundless . . . ." 434 U.S. at 422. The law is clear that this standard is met when a plaintiff's claim rests on a legal theory that is "clearly unavailable . . . under existing case law." *Reeves v. Harrell,* 791 F.2d 1481, 1485 (11th Cir. 1986); *see also Werch v. City of Berlin,* 673 F.2d 192, 195 (7th Cir. 1982). Thus, the invalidity of a plaintiff's legal theory justifies a fee award if that theory was barred by existing precedent or if it was otherwise unsupported and unreasonable.

Under this standard, Respondent was unquestionably liable for the fees incurred by EMC in responding to Respondent's 42 U.S.C. § 1985(3) claims and her Title VII claims against her supervisors in their individual capacities. Indeed, the district court essentially conceded as much, noting that these claims were dismissed "because they were barred by controlling Supreme Court and other precedent." App., *infra,* 4a.

Respondent's § 1985(3) conspiracy claims were conclusively foreclosed by *Great American Federal Savings & Loan Association v. Novotny,* 442 U.S. 366 (1979), at the time she filed this lawsuit. *Novotny* expressly holds that "deprivation of a right created by Title VII cannot be the basis for a cause of action under § 1985(3)." *Id.* at 378. To this day, Respondent has not even attempted to justify her assertion of these patently frivolous § 1985(3) claims, nor could she. Thus, it is beyond dispute that Respondent's § 1985(3) claims were "frivolous, unreasonable, or groundless" within the meaning of *Christiansburg,* 434 U.S. at 422.

Respondent's Title VII claims against her individual supervisors were likewise baseless. Indeed, at the time Respondent filed her lawsuit, the uniform rule was that neither Title VII nor its closest statutory analogue, the Age Discrimination in Employment Act, permitted discrimination claims to be asserted against individual supervisors. *See, e.g., Clanton v. Orleans Parish Sch. Bd.,* 649 F.2d 1084, 1099 & n.19 (5th Cir. Unit A 1981) ("our research has failed to uncover a single case in which a public official has been held personally liable for backpay under Title VII"); *Padway v. Palches*, 665 F.2d 965, 968 (9th Cir. 1982); *Huebschen v. Department of Health & Soc. Serv.*, 716 F.2d 1167, 1170 (7th Cir. 1983); *Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991); *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 587-88 (9th Cir. 1993) ("it is inconceivable that Congress intended to allow civil liability to run against individual employees"); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1125 (10th Cir. 1993); *Smith v. St. Bernard's Reg'l Med. Ctr.*, 19 F.3d 1254, 1255 (8th Cir. 1994); *Grant v. Lone Star Co.*, 21 F.3d 649, 652-53 (5th Cir. 1994); *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 510 (4th Cir. 1994).[2]

Accordingly, the prohibition against suing individual supervisors under Title VII was clear at the time Respondent filed her lawsuit in December 1994. Nonetheless, Respondent chose to sue the individual defendants for millions of dollars in alleged damages, without offering even the most implausible explanation for her blatant disregard of governing law.

The courts below offered no justification for their refusal to award attorney's fees with respect to Respondent's § 1985(3) claims and her Title VII claims against the individual defendants. As demonstrated above, those claims were plainly frivolous, and neither the district court nor the court of appeals suggested any reason for reaching a contrary conclusion, nor could they have done so under these circumstances. Accordingly, even leaving aside the frivolousness of Respondent's other claims, the court of appeals erred as a matter of law in refusing to award EMC its attorney's fees incurred in resisting these indisputably groundless claims.[3]

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[2] *See also Lissau v. Southern Food Serv., Inc.*, 159 F.3d 177, 181 (4th Cir. 1998) (noting that application of Title VII to individual supervisors has been rejected by "every circuit that has confronted this issue," citing ten circuits); *Wathen v. General Elec. Co.*, 115 F.3d 400, 406 (6th Cir. 1997); *Lenhardt v. Basic Inst. of Tech., Inc.*, 55 F.3d 377, 381 (8th Cir. 1995).

The court of appeals' refusal to award attorney's fees even with respect to these indisputably frivolous claims creates a square circuit conflict with decisions of the First, Seventh, and Eleventh Circuits. Those courts have reached precisely the opposite result on this issue, holding that fees should be awarded to prevailing defendants as long as some of the plaintiff's claims were unreasonable, frivolous, or without foundation, even if other claims asserted by the plaintiff were not frivolous.

In *Curry v. A.H. Robbins Co.*, 775 F.2d 212 (7th Cir. 1985), for example, the court squarely held that a prevailing defendant may be awarded fees incurred in defending against a frivolous claim or portion thereof, even if other claims asserted by the plaintiff were not frivolous. The district court in *Curry* had held that the plaintiff's reliance on 42 U.S.C. § 1983 was frivolous, and awarded attorney's fees to the prevailing defendant with respect to that claim. 775 F.2d at 215. The plaintiff appealed, asserting that the fee award was improper because she had also asserted other, non-frivolous claims, including non-frivolous aspects of the same count of the complaint that the district court had deemed frivolous. *Id.* at 219. The court of appeals categorically rejected that argument, explaining: "The fact that other claims have been raised . . . which might not properly be characterized as frivolous, does not require this court to reverse the district court's award of attorney's fees." *Id.* at 220. Accordingly, the court of appeals affirmed the district court's award of attorney's fees, despite the absence of any showing that the remaining claims asserted by the plaintiff were also frivolous. *Id.* at 220-21.

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[3] EMC paid the attorney's fees incurred on behalf of the individual defendants and is therefore the proper party to seek an award of such fees. *See* C.A. Jt. App. 44, 46 (EMC's counsel filed motion to dismiss the claims against the individual defendants).

Similarly, in *Andrade v. Jamestown Housing Authority*, 82 F.3d 1179 (1st Cir. 1996), the plaintiff asserted three causes of action against certain defendants arising out of the termination of her employment. The district court rejected those three claims as a matter of law and awarded the defendants their attorney's fees as prevailing parties under 42 U.S.C. § 1988. *Id.* at 1183. On appeal, the court of appeals expressly rejected the district court's finding that all three of the claims were frivolous: "[W]e disagree with the district court's finding that the [intentional infliction of emotional distress] claim was frivolous when brought," and thus "only two of the three claims were frivolous" within the meaning of *Christiansburg*. *Id.* at 1193 n.9. Despite this express holding that not all of the plaintiff's claims were frivolous, however, the court of appeals affirmed the district court's award of attorney's fees to the prevailing defendants. *Id.* at 1193.

The Eleventh Circuit reached a similar conclusion in *Head v. Medford*, 62 F.3d 351 (11th Cir. 1995). In that case, the plaintiff asserted both federal constitutional claims and pendent state-law claims. The district court rejected the federal claims on the merits, declined to exercise supplemental jurisdiction over the state-law claims, and rejected the defendants' request for an award of attorney's fees. *Id.* at 353. On appeal, the Eleventh Circuit reversed the denial of attorney's fees on the ground that "plaintiff's federal due process claims were legally frivolous as a matter of law" (*id.* at 356), notwithstanding *the fact that no determination of frivolousness* had been or could be made with respect to the unadjudicated state-law claims. *See also Popham v. City of Kennesaw*, 820 F.2d 1570, 1582 (11th Cir. 1987) (suggesting in dictum that it would be appropriate to award attorney's fees to a defendant forced to defend against some frivolous claims even in a case where the plaintiff actually *prevailed* on other claims).[4]

In contrast to the foregoing precedents, at least two other courts of appeals appear to have adopted the approach followed by the court below. In *Colombrito v. Kelly*, 764 F.2d 122 (2d Cir. 1985), the Second Circuit reversed a district court's award of attorney's fees to defendants who had prevailed on multiple civil rights claims. The court of appeals expressly recognized the possibility that the plaintiff had continued to litigate his claim under 42 U.S.C. § 1983 after it had become frivolous—a course of conduct that would have justified an award of attorney's fees under *Christiansburg*, 434 U.S. at 422. Nonetheless, the court reversed the award of attorney's fees outright, explaining that "even if the continuation of the § 1983 claim past discovery were frivolous," the plaintiff's "suit cannot be considered groundless, frivolous, or meritless" "[o]n the whole" because other, related claims were not frivolous. 764

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[4] Other courts of appeals have adopted this same approach in awarding attorney's fees under other provisions of law that authorize fee awards for frivolous litigation. *See, e.g., Merriman v. Security Ins. Co. of Hartford*, 100 F.3d 1187, 1195 (5th Cir. 1996) (upholding award of attorney's fees under FED. R. CIV. P. 11 where the plaintiff's complaint asserted "both frivolous claims and nonfrivolous ones").

F.2d at 132. Thus, like the court below, the Second Circuit appears to require a showing that a plaintiff's case is frivolous "on the whole" before an award of attorney's fees to a prevailing defendant will be permitted.

Similarly, the Sixth Circuit has held that an award of attorney's fees under 42 U.S.C. § 1988 is improper where some, but not all, of the plaintiff's claims were frivolous. In *Tarter v. Raybuck*, 742 F.2d 977 (6th Cir. 1984), the district court had awarded attorney's fees to the prevailing defendant after concluding that the plaintiffs' claims for false imprisonment, readmission to school, and violation of the Fourth Amendment were frivolous. *Id.* at 978. The court of appeals agreed with the district court's conclusions that the claim for readmission was "meritless" and that the claim for false imprisonment was "'patently without merit.'" *Id.* at 987 (citation omitted). The court of appeals held, however, that the Fourth Amendment claim was not frivolous, and accordingly reversed the award of attorney's fees altogether. The court explained that "the district court abused its discretion in awarding attorneys fees to defendants in this case" because "we cannot conclude that this action was wholly meritless or without foundation." *Id.*; *see also Sommers v. Schaefer*, 849 F.2d 1474, 1988 WL 61500 at *2 (6th Cir. 1988) (Table) ("[I]t is error to award attorney's fees against a claimant when some, but not all, claims are frivolous. *Tarter [v. Raybuck]*, 742 F.2d at 987-88.").[5]

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[5] Unpublished decisions of the Sixth Circuit "may be cited" by litigants in that court if they "ha[ve] precedential value in relation to a material issue in a case, and . . . there is no published opinion that would serve as well." 6th CIR. R. 28(g).

As the foregoing discussion amply demonstrates, the circuits are sharply divided over the question whether a plaintiff's assertion of some frivolous claims suffices to require an award of attorney's fees to the defendant under 42 U.S.C. § 1988, 42 U.S.C. § 2000e-5(k), and related fee-shifting statutes, even if other claims asserted by the plaintiff were not frivolous. This case offers an opportunity for this Court to confront and resolve that circuit conflict and provide much-needed clarity to lower courts presented with this recurring question.

CONCLUSION

The decision below conflicts with the decisions of other courts of appeals and incorrectly resolves the important legal issues raised by this case, which are of far-reaching significance to the administration of justice in the federal courts. Particularly now that the availability of compensatory and punitive damages has increased the financial incentives for disgruntled employees to bring meritless employment discrimination cases in the hope of extracting a substantial settlement, vigorous judicial enforcement of defendants' rights to fee awards is essential to the maintenance of the "fair adversary process" that Congress sought to foster with such awards. *Christiansburg*, 434 U.S. at 419. Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Counsel for EMC Corporation

July 31, 2000

APPENDIX

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 99-1149

JOAN H. BRAITSCH,
Plaintiff-Appellee,
versus
EMC CORPORATION,
Defendant-Appellant,
and
THOMAS AARON; MICHAEL GRILLI;
FRANK KEANEY,
Defendants.

Appeal from the United States District Court for the
Eastern District of Virginia, at Alexandria.
Claude M. Hilton, Chief District Judge.
(CA-94-1693-A)

Submitted: January 11, 2000

Decided: March 20, 2000

Before MICHAEL and TRAXLER, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

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* * * * *

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Appellant EMC Corporation, the prevailing party in a civil rights action brought by Appellee Joan H. Braitsch, appeals the district court's refusal to award attorney's fees. This is the second time this issue has come before us. In EMC's previous appeal, we noted an ambiguity in the record concerning the district court's rationale for denying fees, and we therefore remanded for further proceedings. *See Braitsch v. EMC Corp.*, No. 97-1467, 1997 WL 787125 (4th Cir. Dec. 24, 1997) (unpublished).

The district court has now clarified its reasons for denying fees. We have reviewed the court's opinion and find no abuse of discretion. See *DeBauche v. Trani*, 191 F.3d 499, 510 (4th Cir. 1999) (noting that whether to grant or deny fees is a matter for the district court's discretion). Accordingly, we affirm the district court's order declining to award attorney's fees. Furthermore, because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process, we grant Braitsch's motion for summary affirmance and deny EMC's request for oral argument.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

JOAN H. BRAITSCH,)
)
Plaintiff,)
)
v.) CIVIL ACTION
) NO: 94-1693-A
EMC CORPORATION,)
)
Defendant.)

MEMORANDUM OPINION

This case is before the Court on remand of this Court's denial of EMC's petition for attorney's fees under Title VII (42 U.S.C. § 2000a-5) and the Civil Rights Attorney's Fee Act (42 U.S.C. § 1988 (CRAFA)).

The Fourth Circuit has remanded for amplification of this Court's finding that the case was not frivolous, unreasonable, or without foundation. EMC argues that nothing in the record constituted a reasonable basis for Braitsch's pursuing it after extensive discovery revealed that she had no basis in law or fact.

Under *Arnold v. Burger King Corporation*, 719 F.2d 63, 66 (4th Cir. 1983), *cert. denied*, 469 U.S. 826 (1984), the court must assess the claim after a careful and thorough evaluation of the record and appropriate fact finding. EMC claims entitlement to the fees incurred in defending against Braitsch's civil rights conspiracy claims seeking some $8 million against individual supervisors and the company her Title VII claims against the individuals. Early in the litigation this Court dismissed those claims under Rule 12(b)(6) Fed. R. Civ. P. because they were barred by controlling Supreme Court and other precedent. *See e.g., Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366 (1979).

EMC also claims upon a review of the entire record it can be found that Braitsch's pursuit of her Title VII claims against the Company were unfounded in fact because this Court entered judgment for EMC under Fed. R. Civ. P. 50 after she rested her case, finding that she failed to establish a *prima facie* case. This Court found no evidence of sex discrimination that could go forward to this jury and the Fourth Circuit Court of Appeals affirmed. Taking all of Braitsch's case in the light most favorable to her under Rule 50, this Court found that Braitsch and a male employee were hired together at the same salary in 1990. Neither of them made their quotas. Braitsch did better than her male colleague, but was kept longer. The Court found that the three sales representatives hired in 1991, including a woman, Ms. Pietras, were hired at a slightly higher pay level under a new pay plan. Thus, this Court found that there was no indication that the difference in pay was because of the sex of anyone involved.

While the defendant is correct that the Court found insufficient evidence for the plaintiff to go to the jury in ruling on the Rule 50 motion, that alone is insufficient to make the finding that the plaintiff proceeded unreasonably and without foundation. A favorable ruling on a Rule 50 motion does not automatically entitle a defendant to an award of attorney fees.

Christiansburg Garment Co. v. EEOC, 434 U.S. 412, (1978), indicates that fundamental fairness in the adversary process requires an award of attorney's fees and costs to an employer, when the losing party has filed or pursued a case that is unreasonable, frivolous, or without foundation. *Christiansburg* also cautions of the chilling effect an award of attorney's fees and costs can have on plaintiff who have legitimate claims to pursue.

While the plaintiff has causes of action dismissed early in the case, her complaint survived an early summary judgment motion. At trial she presented evidence of different treatment and different treatment with male coworkers. This Court found that evidence not sufficient to make a *prima facie* case. However, the Court cannot find that this case was pursued in a frivolous, unreasonable manner or without foundation.

Defendant contends that Braitsch has never adequately explained why a case without foundation at trial under Rule 50 is not also "without foundation" under the *Christiansburg* test. When a Court finds "no evidence" of bias – as the Fairfax Human Rights Commission, this court and the Fourth Circuit all did in this case – an employer ordinarily ought to have met *Christiansburg*'s rule that a defendant is entitled to some fees when the plaintiff's case lacks foundation. 434 U.S. at 421-422. No reason exists as to why her case should be considered any better before trial than it was at trial. Braitsch was able to get all of her witnesses to trial and all relevant documents into evidence. She has no justification for pursuit of her case since it was no better or different at trial or on appeal than it was before the Fairfax Human Rights Commission.

Defendant contends that certain admissions by the plaintiff indicates she knew she could not make a *prima facie* case. She admitted that she was paid the same as the two salesmen hired in her year in her division; she admitted that she never made her sales quotas (at best reaching 36% of the required level); she conceded that three of her male peers were also fired for failing to meet quota after having been afforded less time on the job than she had; she admitted that no EMC supervisors ever made any sexist remarks to her; and she was replaced with a woman.

However, the plaintiff presented evidence that her male counterparts were paid a higher base salary; that certain of her male counterparts were allowed to invade her territory without being punished; that her male counterparts received a higher car allowance; and her manager rebuffed her when she complained of a violation of the equal pay laws.

Considering the evidence presented by the plaintiff this Court cannot find that the plaintiff pursued this case in a frivolous or unreasonable manner. Her evidence did not rise to a *prima facie* case, but there was evidence presented where the argument could reasonable be made.

An appropriate Order shall issue.

/s/

Claude M. Hilton

UNITED STATES DISTRICT
JUDGE

Alexandria, Virginia
January 5, 1999

APPENDIX C

UNPUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 97-1467

JOAN H. BRAITSCH,

Plaintiff-Appellee,

v.

EMC CORPORATION,

Defendant-Appellant,

and

THOMAS AARON; MICHAEL GRILLI;
FRANK KEANEY,

Defendants.

Equal Employment Advisory Council,
Chamber of Commerce, New England
Legal Foundation, and National
Employment Lawyers Association,

Amici Curiae.

Appeal from the United States District Court for the
Eastern District of Virginia, at Alexandria.
Claude M. Hilton, Chief District Judge.
(CA-94-1693-A)

Argued: October 30, 1997

Decided: December 24, 1997

Before MICHAEL, Circuit Judge, BUTZNER, Senior Circuit Judge, and BULLOCK, Chief United States District Judge for the Middle District of North Carolina, sitting by designation.

OPINION

PER CURIAM:

EMC Corporation appeals the district court's denial of its petition for attorney's fees under 42 U.S.C. § 1988. We cannot determine the reasons for the district court's conclusions and therefore vacate the judgment and remand for amplification.

I

Joan H. Braitsch sued EMC Corporation claiming that EMC discriminated against her on the basis of gender, during the course of her employment and in her termination, violating Title VII of the Civil Rights Act, 42 U.S.C. § 2000(e). EMC moved for summary judgment before trial. District Judge Leonie M. Brinkema denied the motion without prejudice reasoning that "because [Braitsch] ha[d] not been afforded the opportunity to take discovery yet . . . it [was] premature to address the summary judgment issue."

During the subsequent trial, EMC moved for judgment as a matter of law at the conclusion of Braitsch's evidence. District Judge Claude M. Hilton granted this motion and dismissed the case.

Braitsch filed a notice of appeal, after which EMC filed a petition for attorney's fees in the district court. District Judge Hilton denied EMC's motion. This court affirmed the dismissal of Braitsch's case by unpublished per curiam opinion. EMC then filed a second petition for attorney's fees in the district court. Judge Hilton also denied that motion. From this second denial, EMC now appeals.

II

"[A] district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). Judge Hilton, denying EMC's first petition for attorney fees, wrote "[i]t appearing to this Court that Plaintiff's case survived Defendant's Motion for Summary Judgment and proceeded to trial, the Court finds that Plaintiff's case was not frivolous, unreasonable, or without foundation." Judge Hilton denied EMC's second petition for attorney's fees "for the reasons stated in [his prior] order."

EMC argues that Judge Hilton's conclusion that Braitsch's case was not frivolous was based solely on Judge Brinkema's earlier denial of summary judgment. According to EMC, Judge Brinkema's denial of summary judgment was based only on the observation that discovery was not complete, and this reason could not form a basis for the *Christiansburg* analysis. Braitsch argues that Judge Hilton independently found that her lawsuit was not frivolous.

It is not clear from the order whether Judge Hilton undertook an independent analysis of the case or relied on Judge Brinkema's earlier denial of summary judgment. We vacate the district court's judgment and remand to Judge Hilton for amplification of his conclusion that the case was not frivolous, unreasonable, or without foundation.

VACATED AND REMANDED.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

JOAN H. BRAITSCH,)
)
Plaintiff,)
v.) C. A. No: 94-1693-A
)
EMC CORPORATION,)
)
Defendant.)

[Filed Mar. 6, 1997]

ORDER

This matter came before the court on Defendant's Petition for Attorney's Fees. Defendant filed a Motion for Interim Attorney's Fees which was denied by this Court on December 15, 1995. In its present petition the defendant reiterates its earlier arguments regarding its entitlement to attorney's fees, and in addition seeks additional fees incurred for defending the appeal to the Fourth Circuit. It appearing to the Court that defendant's motion should be denied for the reasons stated in the Court's December 15, 1995 order, it is hereby

ORDERED that Defendant's Petition for Attorney's Fees is DENIED.

/s/
Claude M. Hilton
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
March 6, 1997

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 95-2503

JOAN H. BRAITSCH,
Plaintiff-Appellant,
v.
EMC CORPORATION,
Defendant-Appellee,
and
THOMAS AARON; MICHAEL GRILLI; FRANK KEANEY,
Defendants.

Submitted: August 22, 1996

Decided: September 12, 1996

UNPUBLISHED

Before HALL, WILLIAMS, and MICHAEL, Circuit Judges.

Affirmed by unpublished per curiam opinion.

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* * * * *

OPINION

PER CURIAM:

Joan H. Braitsch filed a civil suit claiming gender discrimination under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A. § 2000e (West 1994), retaliation, and violation of the Equal Pay Act, 29 U.S.C. § 206(d) (1988), arising out of her employment with, and termination by, EMC Corporation. Braitsch appeals the district court's entry of judgment on behalf of EMC, based on its grant of EMC's Fed. R. Civ. P. 50(a) motion at the close of Braitsch's trial evidence. For the reasons set forth below, we affirm.

This Court reviews de novo the grant or denial of a motion for judgment as a matter of law. *Gairola v. Virginia Dep't of Gen. Servs.*, 753 F.2d 1281, 1285 (4th Cir. 1985). The standard of review for the granting of a judgment as a matter of law is whether the evidence is so substantial or conclusive that any contrary verdict would necessarily be based on speculation or conjecture. *Id.* In considering such a motion, the court must construe the evidence in the light most favorable to the party against whom the motion is made. *Garraghty v. Jordan*, 830 F.2d 1295, 1302 (4th Cir. 1987). The question is not whether there is no evidence, but whether there is sufficient evidence upon which a factfinder can properly proceed to reach the verdict sought. *Ralston Purina Co. v. Edmunds*, 241 F.2d 164, 167 (4th Cir.), *cert. denied*, 353 U.S. 974 (1957).

This Court's review of the record and transcript in this case reveals that Braitsch failed to establish a prima facie case of employment discrimination on the basis of gender. *See O'Connor v. Consolidated Coin Caterers Corp.*, ___ U.S. ___, 64 U.S.L.W. 4243 (U.S. April 1, 1996) (No. 95-354); *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

The trial evidence established that despite the fact that Braitsch's compensation package was less than employees (both male and female) hired in 1991 and later, Braitsch admitted that she was hired at the same compensation package as the other employee hired in 1990 (a male). Moreover, she admitted that she failed to make sales quota in either 1990 (her first year of employment) or 1991 – even by her own calculations – and that the male employee hired at the same time who also failed to make quota in either his first or second year was likewise terminated in his second year of sales.[*] Nor did Braitsch present any evidence that her quota was higher than that of her male counterparts or that her sales territories were inferior. Although Braitsch disputed the manner in which credit for sales made were attributed to individual employees, we find no evidence to support a reasonable conclusion of gender discrimination. In addition, we find that EMC's failure to put Braitsch on a formal performance improvement program prior to her termination, given that EMC failed likewise to put two of the three male employees terminated for failing to meet quota on such a program, likewise fails to establish gender discrimination.

Nor did Braitsch rebut the legitimate, nondiscriminatory reason EMC proffered to support its termination of Braitsch, that is, her failure, after her second year of sales, to meet her sales quota. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253, 256 (1981); *Conkwright v. West-*

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[*] Other evidence at trial revealed that two other male employees who failed to make their quotas were terminated in their first year.

inghouse Elec. Corp., 933 F.2d 231, 234-35 (4th Cir. 1991).

Given these facts, we find, as did the district court, that Braitsch failed to establish facts sufficient to prove a prima facie case of gender discrimination relative to her compensation, assignments, or termination. Nor did she establish retaliation for engaging in a protected activity. Finally, we find that the district court's grant of EMC's Rule 50(a) motion was likewise proper as to Braitsch's Equal Pay Act claim. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

JOAN H. BRAITSCH,)
)
Plaintiff,)
)
v.) C. A. No: 94-1693-A
)
EMC CORPORATION,)
)
Defendant.)

[Filed Dec. 15, 1995]

ORDER

This matter comes before this Court on Defendant's Motion for Interim Attorney's Fees pursuant to 42 U.S.C. § 1988 and 42 U.S.C. § 2000e-5(k). Defendant alleges that, due to insufficient investigation by the Plaintiff, this lawsuit was frivolous, unreasonable, and without foundation. It appearing to this Court that Plaintiff's case survived Defendant's Motion for Summary Judgment and proceeded to trial, the Court finds that Plaintiff's case was not frivolous, unreasonable, or without foundation. It is hereby

ORDERED that Defendant's Motion for Interim Attorney's Fees is DENIED.

/s/
Claude M. Hilton
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
December 15, 1995

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

JOAN H. BRAITSCH, Plaintiff,	
v.	C. A. No. 94-1693-A
EMC CORPORATION, Defendant.	

ORDER

This case came before the Court for trial with a jury. At the conclusion of the plaintiff's evidence and on the defendant's motion for judgment as a matter of law pursuant to Rule 50 of the Federal Rules of Civil Procedure, and for reasons stated from the bench, it is hereby

Ordered that the defendant's motion is GRANTED, and this case is DISMISSED.

/s/
UNITED STATES DISTRICT JUDGE

Alexandria Virginia
August 4, 1995

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

JOAN H. BRAITSCH, Plaintiff,	
v.	C. A. No. 94-1693-A
EMC CORPORATION, Defendant.	

TRIAL TRANSCRIPT

July 31 & August 1, 1995

Before: Claude M. Hilton, Judge

And a Jury

[238] THE COURT: All right. Well, the allegations in this case, of course, is that this plaintiff was discriminated in her employment because of her sex, and was discriminated in compensation because of her sex, and was retaliated against because she filed a claim or made a claim of sexual discrimination. And the only thing that I have [239] heard in this evidence is simply disagreement on whether somebody was performing at an acceptable level or not performing at an acceptable level or not performing at an acceptable level.

It may be that this plaintiff and Mr. Monkelien both were treated unfairly, in quotes, in that they were the first salespeople that came on. They had a new product, it wasn't very well accepted, they had a hard time selling it. Maybe the quotas were unrealistic. They did the groundwork, didn't make all that much money, got terminated because they didn't make their quotas. The people who came on behind them benefited from their groundwork and the knowledge that the product was out there and they seem to be doing better from what evidence that I have heard in terms of the commissions that are being made and the recognition of the product. But that doesn't have anything to do with sex discrimination or paying someone a different compensation because of their sex.

Both this plaintiff and Mr. Monkelien were hired at the same salary in 1990. Neither of them made their quotas. This plaintiff did better than Mr. Monkelien, was kept longer, but was terminated ultimately because the quota wasn't made.

There were three other people that were hired in 1991 who were hired at a slightly higher guarantee and at a slightly different salary, but they changed the compensation [239] plan in 1991. All of those people who were hired in '91 were hired at a different salary than the people that were hired in 1990. There is really no comparison between this plaintiff and the people that were hired, no indication that the difference in pay was because of the sex of anyone involved. And really the proof of that is that when Mrs. Pietras was hired, she was hired for the same salary as the men who were hired later.

This case is not about whether an employee should have been retained or should have been let go or whether the performance was good or whether it was bad. The burden here is to make a prima facie case of sexual discrimination. And I just find no evidence at all of sexual discrimination in pay. This plaintiff was paid just what the men were. And the one woman, I don't know about anybody else, I have only got the testimony of one woman hired later, she was paid the same as the men.

I simply find that there is no evidence of sex discrimination that could go forward to this jury. And the motion for judgment as a matter of law will be granted.

* * * *

[241] And I find that there is just no evidence to go forward on where any reasonable jury could find that there was discrimination based on sex.

Mr. Monkelien and this employee were hired at the same time and they were paid the same, they were both terminated because of performance. The people who were hired the following year were all paid the same, and the woman who was hired to replace this plaintiff was paid the same as those people they hired later.

And while there may be some complaint by this plaintiff and Mr. Monkelien that they came in when the product was hard to sell and maybe the quota was too high and they couldn't do it, and maybe justly so they couldn't do it, I don't know, that is not for us to determine, but after they had done all the groundwork and the product gets a little more popular, the other people come in and they are doing better and making more money. That may not be fair in the [242] whole scheme of things, I don't know, I am not to determine that, but I find that there is no evidence at all of discrimination because of sex. And I have granted the motion to dismiss.

APPENDIX I

FAIRFAX COUNTY
HUMAN RIGHTS COMMISSION
12000 Government Center Parkway,
Suite 318
Fairfax, Virginia 22035-0093

VIRGINIA Telephone: (703) 324-2953 TDD: (703) 222-5521

May 27, 1994

Ms. Joan H. Braitsch
6005 Copley Lane
McLean, Virginia 22101

Re: HRC #92178E/EE0C #10D920160
Braitsch v. EMC Corporation

Dear Ms. Braitsch:

The staff of the Fairfax County Human Rights Commission has completed its investigation of your above-referenced complaint and has concluded that there is insufficient evidence to support your allegations that you were discriminated against because of your gender (female) when EMC Corporation terminated your employment in January 1992.

This complaint was filed within the meaning of Chapter 11 of the Code of the County of Fairfax, Virginia (Human Rights Ordinance) on June 29, 1992. The alleged act occurred within the geographical jurisdiction of Fairfax County and was filed within the one (1) year statute of limitations. The respondent conducts business in Fairfax County and meets the definition of an employer as defined in the Human Rights Ordinance.

You state that you were hired by the respondent in March 1990 as a federal account sales representative. You allege that since becoming employed you have been discriminated against by the respondent because of your sex. In support of your claim you allege the following:

(1) You were paid a smaller base salary and a smaller automobile allowance than three of the four male co-workers who held the same position that you held.

(2) You were given a smaller territory than two of the four male co-workers who held the same position that you held. You state that you were assigned a higher quota than your male co-workers even though you had a smaller territory.

(3) Management attempted to withdraw an independent federal agency customer from you because it wanted to give the customer's account to a male co-worker.

(4) In June 1991, management excluded you from a federal district office golf outing held during business hours and the participants were on business time.

(5) Management excluded you and another female employee from an inter-office softball competition at a national quarterly sales meeting that took place in Hopkinton, Massachusetts in the summer of 1991.

(6) You were unjustly criticized by Mr. Thomas R. Aaron, district manager, Washington, D. C. sales office, on November 11, 1991, and the quarterly goals you had established for the fourth quarter of CY 1991, which you had achieved, were ignored.

(7) Your employment was terminated by the respondent in order to avoid the payment of a commission on a Department of Transportation $2.5 million acquisition, one of your federal customer accounts.

(8) Your employment was terminated in January 1992 without the benefit of being placed on the standard three month performance improvement plan. A male co-worker was afforded this opportunity before his discharge in April 1991.

EMC Corporation contends that you were treated like any other sales representative who failed to meet quota and did not produce the revenues required for the good health of the corporation. EMC Corporation states that your sex had absolutely no bearing on any action taken by any member of the company regarding your employment.

Your first allegation is that you were paid a lower base salary and a lower automobile allowance than three of the four male co-workers who held the same position as you during your period of employment with the respondent.

The Commission staff reviewed the 1990 and 1991 Domestic Sales Compensation Plan for EMC Corporation and obtained an affidavit from Mr. David R. Bishop, manager of sales planning and controls for the domestic sales division. Under the compensation plan your compensation was comprised of a base salary and sales commission. Sales representatives for the ESG product line (the product you were selling to the federal customers) had a base salary range between $32,000 and $40,000 per annum. The standard commission for a sales representative was two percent (2 percent) for the first one million dollars in sales; four percent (4 percent) for sales exceeding one million dollars, but less than two and one-half million dollars; and five percent (5 percent) for sales that exceeded two and one-half million dollars.

In addition to a base salary plus commission, a sales representative is entitled, during the first year of employment, to a non-recoverable draw against commission. This non-recoverable draw against commission ranges from a minimum of $3,000 per month to a maximum of $3,500 per month. A sales representative usually receives this non-recoverable draw for the first three months of employment. The draw may be extended for an additional three months, but usually on a recoverable basis. However, as an exception to policy, the non-recoverable draw may be extended with the approval of the senior vice president of North American Sales.

Sales representatives are also provided an automobile allowance, depending on geographic location and the demands of the territory. The automobile allowance is determined by the senior vice president for North American Sales. In 1990, the automobile allowance for federal account sales representatives in the Washington district was established at $325.00 per month plus gas and oil. In 1991, this allowance was established at $360.00 per month plus gas and oil.

The Commission staff extracted the base pay and allowances that you and your male co-workers received, from your payroll records, for the calendar years 1990 and 1991. This information covers the time frame of your employment and is set forth below.

CY 1990

Name	**Base Salary**	**Non-Recoverable Draw**	**Auto**
Dean L. Monkelien	$35,000	$3,500 (9 months)	$325
Joan H. Braitsch	$35,000	$3,500 (9 months)	$325

CY 1991

Name	Base Salary	Non-Recoverable Draw	Auto
Dean L. Monkelien	$35,000	NONE	$325
Joan H. Braitsch	$35,000	NONE	$325
Lawrence P. Seder	$35,000	$3,000 (3 months)	$360
James E. Newgaard	$40,000	$3,000 (3 months)	$360
William E. Hoover	$40,000	$3,000 (3 months)	$360

It is clear that during the thirteen months that you and Mr. Monkelien were colleagues and peers, that you were compensated on the same level as Mr. Monkelien for all of the calendar year 1990 and for the first quarter of calendar year 1991. On April 15, 1991, Mr. Monkelien was discharged for poor performance and beyond that point is not considered in the comparisons.

The Commission staff's comparison of your compensation package with that of Mr. Seder reflects a decided advantage to you when viewed in terms of the first nine months of each sales representative's employment.

NAME	BASE	DRAW	CAR ALLOWANCE FOR 9 MONTHS	TOTAL
Joan H. Braitsch	$26,250	$31,500	$2,925 =	$60,675
Lawrence P. Seder	$26,250	$ 9,000	$3,240 =	$38,490

Both you and Mr. Monkelien received a compensation package that was $22,185 larger than the compensation package that Mr. Seder received during the same period of his employment. The only advantage that Mr. Seder appeared to have over you was in the area of his automobile allowance since at the time of his employment your automobile allowance should have been the same as his at $360.00 per month. Had you been receiving that allowance your advantage would have increased by $315.00.

Mr. James E. Newgaard was hired by the respondent in March 1991, one year after you began your employment. According to you: prior to being hired as a sales representative, Mr. Newgaard was considered by the respondent for the position of district manager; the position was awarded to Mr. Aaron in January 1991. Had he been successful, Mr. Newgaard would have been your supervisor. Mr. Newgaard was hired with the compensation package cited above. The actual compensation that Mr. Newgaard received for the first nine months of employment is compared to yours below:

NAME	BASE	DRAW	CAR ALLOWANCE FOR 9 MONTHS	TOTAL
Joan H. Braitsch	$26,250	$31,500	$2,950 =	$60,675
James E. Newgaard	$30,000	$ 9,000	$3,240 =	$42,240

The comparison reflects an $18,435 advantage to you when compared for a similar period. Mr. Newgaard has the advantage that Mr. Seder has in automobile allowance when the comparison uses only the 1991 schedules to compare you with your male co-workers. Mr. Newgaard has the advantage of a $5,000 larger base salary than not only you, but also Mr. Monkelien and Mr. Seder.

EMC Corporation states that Mr. Newgaard was offered the base salary of $40,000 because of his extensive experience of selling and managing in the federal marketplace. You have disputed this by saying the Mr. Newgaard had not sold computers for twenty years and that his most recent experience was as a program manager. The Commission staff has reviewed the experience and work history of Mr. Newgaard and found twenty-two years of selling to the federal government as well as management of several large scale government contracts. Based on an evaluation of Mr. Newgaard's experience when compared to the experiences of you, Mr. Monkelien, and Mr. Seder, the salary variance does not seem out of line. Further, considering that Mr. Newgaard's salary was also greater than the two male co-workers named above, it would not appear that the variance in salary was gender based.

The final comparison of compensation packages was with that of Mr. William E. Hoover. Mr. Hoover received the same package that Mr. Newgaard received. Mr. Hoover was hired in July 1991 and his employment was terminated at the same time that the company terminated your employment. Therefore, only six months of data was available and is listed below:

NAME	BASE	DRAW	CAR ALLOWANCE FOR 6 MONTHS	TOTAL
Joan H. Braitsch	$17,500	$21,000	$1,950 =	$40,450
William E. Hoover	$20,000	$ 9,000	$2,160 =	$31,160

Mr. Aaron has indicated that Mr. Hoover received the offer that he did because he judged his experience and proven track record to be worth $40,000 per year, much as he did with Mr. Newgaard.

The Commission's investigation supports the conclusion that your base salary was less than two of the four male sales representatives (Mr. Newgaard and Mr. Hoover) you were employed with. A review of the resumés of Mr. Newgaard and Mr. Hoover reflects significant experience in selling in the federal sector. Both of these individuals had twenty plus years of experience prior to starting to work for EMC Corporation. You have told the Commission staff that Mr. Newgaard was considered for the position that was eventually awarded to Mr. Aaron. Mr. Newgaard was hired twelve months after you were hired and Mr. Hoover was hired approximately sixteen months after you were hired. At the time of your hire in 1990, you were paid at the same rate as Mr. Monkelien and both of you were hired by Mr. Mike Grilli, the area manager. Mr. Aaron became your district manager in January 1991. Mr. Aaron hired the next three male sales representatives after he assumed responsibility for the district.

According to you, Mr. Mitch Breen, the previous district manager, promised you an increase in your base salary. However, by your own admission the promises were not in writing and no witnesses have been produced that supports your assertion that a salary increase was promised. Company policy states that an increase in base salary will not be approved unless the sales representative meets the established sales quota. Mr. Aaron was not involved in the establishment of your starting salary and was not involved in any commitments to an increase in salary for 1991. In a November 11, 1991, memorandum to you Mr. Aaron states that "as you know, company policy is that raises are not extended to sales representatives who do not achieve their quota for the previous year." A review of all five sales representatives shows that Mr. Aaron did not extend any raises in salaries to any sales representatives based on 1991 sales records.

While it is apparent that your starting salary of $35,000 per year was $5,000 lower than the starting salaries of Mr. Newgaard and Mr. Hoover, it is not apparent that this difference in starting salaries was the result of gender bias on the part of Mr. Tom Aaron or EMC Corporation. Mr. Monkelien was hired with the exact same compensation as you received when hired by Mr. Grilli. The month prior to hiring Mr. Newgaard, Mr. Aaron hired Mr. Seder at a starting salary that was $5,000 less than Mr. Newgaard's starting salary. None of the individuals hired by Mr. Aaron were awarded the amount of non-recoverable draw that you received. It would appear that Mr. Aaron made his decisions regarding the sales representatives and their salaries based on perceived qualifications and not gender.

In the case of your automobile allowance, it appears that both you and Mr. Monkelien were denied the appropriate adjustment to bring your car allowance into compliance with the guide lines set by the senior vice-president for North American Sales. However, since both you and Mr. Monkelien were the victims of this error, it does not appear that the intent was to deny you the increased allowance because of your gender. The Commission staff has determined that you did not receive $420.00 of the car allowance to which you were entitled for the calendar year of 1991. As a result, the Commission staff contacted the attorneys representing the respondent and they have agreed to pay you your entitlement, plus interest for the period January 1991 through December 1993. The adjusted entitlement is $500.22. Therefore, I find insufficient evidence to believe that you were paid a smaller base salary and smaller car allowance than male co-workers because of your sex.

Your second allegation is that you were given a smaller territory than two of the four males sales representatives, and you were assigned a higher quota than your male co-workers. You argue that the various agencies of the federal government were not distributed in an equitable manner which resulted in your disparate treatment. Further, you allege that your quota was established at $625,000 per quarter; whereas, Mr. Hoover, Mr. Newgaard, and Mr. Seder were assigned a quarterly quota of $600,000.

The investigation shows that of thirty-one accounts classified as large accounts by the respondent, you were the responsible sales representative for at least ten of these accounts. Of the thirteen cabinet level agencies in the federal government, you were the responsible sales representative for four of these agencies. Additionally, you asked for, and were assigned, the United States Postal Service (USPS) account after the departure of Mr. Monkelien. Also, you were assigned as 'the sales representative for over one-third of the small agency accounts the respondent was calling upon. The only category of accounts where you did not have more agencies or accounts than the other sales representatives is in the category of medium accounts. Even in this category you had twelve of the seventy one accounts listed by the company.

On November 3, 1991, you prepared an analysis of territory distribution that you sent to Mr. Aaron. Your analysis was based on data regarding the inventory of automatic data processing equipment in various government agencies during the third and fourth quarter of Fiscal Year 1990. Your analysis was made in the first quarter of fiscal year 1992. It was your contention that the data that you used as the basis of your analysis was the best information available. Mr. Aaron disagreed, contending that the data was at least fifteen months old, and that the verbal information that he was receiving from business contacts and colleagues constituted more reliable information.

Your argument that you were given a smaller territory is based on the third and fourth quarter summaries of the 1990 fiscal year report of the estimated value of the automatic data processing equipment that various government agencies owned or leased It is clear that at the time that you raised this issue in your memorandum to Mr. Aaron, you were evaluating the distribution of these agencies based on data that was over fifteen months old and incomplete. Further, the report indicates that for large and very large systems the average age of the equipment at the time of the report was greater than nine years. Therefore, it is clear that your data was not accurate in 1991, and it does not appear unreasonable, let alone discriminatory, for the respondent to question this data.

Your argument highlights accounts that were all assigned to Mr. Monkelien prior to the termination of his employment. The records indicate that you gained the USPS account from Mr. Monkelien's list of accounts and the remainder were distributed among the other three sales representatives. For most of the calendar year of 1991, you had all of the accounts that you had at the time that Messrs. Seder, Newgaard and Hoover were hired. The only exception was the move of the National Security Agency (NSA) account from you to Mr. Hoover because you had received the USPS account. However, this did not occur until several months after Mr. Hoover was hired. The reassignment of this account is discussed.

The other part of your second allegation is that the three male sales representatives had a quarterly sales quota of $600,000. which was $25,000 less than the quota placed on you. The investigation shows that all of the sales representatives in your office had the same quarterly quota, $625,000 per quarter. You have not provided any evidence that supports the contrary. Therefore, the investigation does not support the position that there is a disparity in the assignment of sales territories or sales quotas that is caused by your gender.

Your third allegation is that management attempted to withdraw an independent customer from your assigned clients and award this client to a male co-worker. The investigation determined that the customer you were referring to was the National Security Agency (NSA), which was to be transferred to Mr. Hoover.

Based on a records review and information furnished by you and the respondent, it appears that when Mr. Monkelien was discharged in April 1991 some of his accounts were assigned to the remaining three sales representatives. You specifically requested the United States Postal Service (USPS) account. You were given USPS and in May 1991, after having the account for one month, you received credit for a $124,000 sale. USPS was expected to produce more orders over time. In an affidavit provided to the Commission staff, Mr. Aaron states that after you were given the account you were informed that when a new sales representative was hired, you would have to give up the NSA account as an equivalent direct procurement account. Also, according to Mr. Aaron, you were told that you could continue to work both accounts until a fourth sales representative was hired.

Mr. Hoover was hired by the respondent in July 1991. You did not release the NSA account until some point after November 11, 1991, near the end of Mr. Hoover's tenure with the company. Your November 3, 1991, memorandum regarding territory distribution argues for a redistribution of accounts that leaves you with control of the USPS or NSA accounts. You offer the Veterans Administration (VA) account from your list of clients as well as accounts from Messrs. Seder and Newgaard to create what you put forth as a more equitable list of clients for Mr. Hoover. The memorandum from Mr. Aaron to you dated November 11, 1991, states that you had agreed to the switch when you received responsibility for the USPS account in April 1991.

The evidence supports the conclusion that you agreed to release the NSA account in an effort to obtain the USPS account. When the time came to turn over the account, you waged a campaign to reverse your commitment made some months earlier to relinquish the NSA account and tried to determine which of your accounts should be distributed. This evidence is not supportive of your allegation that an account was taken from you and given to a male because of your sex.

Your fourth allegation is that management excluded you from a federal district golf outing held during business hours in the summer 1991. Mr. Aaron states that he never played golf with other EMC employees. Mr. Aaron states that he did take a day of leave during the fall 1991 and played golf with some associates from outside of the EMC employee pool.

You stated that Mr. Hoover and the other male members of the sales staff could support your position. The Commission staff contacted Mr. Hoover on October 1, 1993, and discussed the issue with him. Mr. Hoover stated that he was invited at one time to play golf with Mr. Aaron. Mr. Hoover states that he does not know if the others were invited because he did not accept and was not present when the others might have been invited to play golf. Mr. Hoover states that he assumed that Mr. Newgaard and Mr. Seder had been invited because some mention had been made that Mr. Seder had a boat and they might get in some fishing. Mr. Hoover states that he thought of the invitation as a business gathering. However, Mr. Hoover stated that the event never took place so he could not say one way or the other. Mr. Hoover confirmed that he does play golf.

Upon further inquiry by the Commission staff, you stated that you do not play golf, but that you felt that if Mr. Aaron was issuing the invitation, you should have been allowed to accompany the foursome in a golf cart. Based on the evidence, it appears that no such golf outing ever took place. Therefore, I find that there is insufficient evidence to support an allegation that you were excluded from a business related golf outing because you are a female.

Your fifth allegation states that you and Ms. Diane Russell were excluded by management from an inter-office sports competition that the company sponsored at a national quarterly sales representative meeting in the summer 1991. You have indicated that in this case Mr. Aaron and the manager of the respondent's west coast operation attempted to set up a softball game between the two offices. You have indicated that the coordination for this event was taking place between the two managers via facsimile. You state that this was an informal discussion between the two managers regarding the game. You indicated that you had seen a roster of potential players that was transmitted between the offices and that your name did not appear on the roster.

The respondent has stated that in the summer 1991 a national sales meeting was held in Hopkinton, Massachusetts. According to the company, sales representatives from across the country met during the day for seminars and meetings. In the evenings EMC sponsored recreational events, open to all employees. The respondent states that on one evening, EMC reserved a "sports bubble" in the nearby town of Natick, Massachusetts. The respondent states that a variety of sports and activities were available to all interested employees, including volleyball, basketball, putt-putt golf, and cocktails and refreshments. The respondent states that no one was excluded from the activities and that those who chose not to participate were free to mingle and enjoy the refreshments. The respondent states that there were many women who participated in the events, including Ms. Russell from your office.

The investigation conducted by the Commission staff has not located the alleged roster and we cannot verify whether or not your name was left off the roster. However, the Commission's investigation has verified that there was no softball game between your office and the West Coast office. There was a company sponsored evening at a sports complex that you were offered the opportunity to attend and participate in various contests with your peers.

You indicated to the Commission staff that Ms. Pat Boyton of Brighton, Michigan, would offer supporting evidence on this issue. The Commission staff interviewed Ms. Boyton. She stated that she was aware of your allegation and that you had indicated to her during the sales conference mentioned above that you had been excluded from this softball game. Ms. Boyton indicated that the information that she had regarding this issue was solely what you had told her and she did not have first hand knowledge of Mr. Aaron's action regarding this issue. Ms. Boyton did indicate that there was a company sponsored sports evening for the participants of the sales meeting, but that you and she did not participate. Ms. Boyton stated that the two of you and a third female employee from Dallas, Texas, had dinner together the evening of the company-sponsored sports outing. She stated that the company had announced during the sales conference that they were sponsoring this sports evening and transportation would be provided for anyone who wanted to attend. Ms. Boyton stated that she did not participate because she felt that she was excluded by the people in her office. Ms. Boyton stated, in response to the Commission's inquiries, that she was not denied the opportunity to participate by any deliberate action of the personnel in her office, but she felt that the males in her office were pairing off in teams and not inviting her to participate.

Ms. Diane Russell has denied your allegation and states that she does not know why you include her in your complaint. Ms. Russell states in her affidavit that the respondent sponsored a sports evening and provided transportation for all who wished to attend and participate in the events that were being offered. Ms. Russell states that she participated in the events of that evening.

Based on the information that has gathered by the Commission staff, concerning this allegation, there is a drought of evidence that would sustain your position. Thus, I find insufficient evidence to believe that the respondent denied you the opportunity to participate in any sporting events that were offered by the company during the national sales meeting that took place in the summer 1991.

As a sixth allegation you state that you were "unjustly criticized by Mr. Thomas R. Aaron, district manager, Washington, D.C. sales office, on November 11, 1991, and the quarterly goals you had established for the fourth quarter of calendar year 1991, which you had achieved, were ignored."

On October 21, 1991, Mr. Aaron issued to you a memorandum detailing your fourth quarter goals and objectives. On October 22, 1991, you forwarded a memorandum to Mr. Aaron indicating how you wanted your goals and objectives amended. The Commission staff was not able to find any document indicating that Mr. Aaron approved the amended objectives. In fact, on October 29, 1991, you prepared a national account plan for the USPS account and the Air Force account as directed in your fourth quarter goals and objectives. On November 11, 1991, Mr. Aaron issued another memorandum to you. Among other things. Mr. Aaron evaluates your performance in this memorandum. He first points out that you did an excellent job on two accounts, but states that those accounts represented just one-fourth of your expected production. Mr. Aaron continues with seven specific instances where he considered you to not have displayed the performance level expected of a sales representative. Mr. Aaron's memorandum dealt with specific performance issues and did not refer to his evaluation of your performance in general unverifiable terms or issues.

You have characterized this criticism as unjust and ignoring the fourth quarter goals you believed you were working towards. Your response to Mr. Aaron's memorandum, written after your discharge, contends that Mr. Aaron misrepresented the facts and is inconsistent with what had taken place in each of the instances that Mr. Aaron raised.

There is an obvious disagreement between you and Mr. Aaron regarding the merits of the points raised in the memorandum. Mr. Aaron's bottom line was that he would not concur with your demands for a pay increase because you were not booking revenue and he felt that there was a lack of communication and trust. Your contention is that Mr. Aaron consistently failed to communicate with you and that after receipt of the November 11, 1991, memorandum, you began to not trust Mr. Aaron. It became apparent during the investigation that communications between you and Mr. Aaron were nonexistent beyond this memorandum.

You base your argument that Mr. Aaron's actions and responses were gender based and discriminatory on the fact that you were the only sales representative not hired by Mr. Aaron, and you were the only female sales representative. As further proof of his bias, you cite the close personal and professional relationships you perceived that he had with Mr. Seder and Mr. Hoover respectively. You cite their lack of experiences and Mr. Aaron's decision to hire them as a demonstration of his bias. The investigation has determined that Mr. Aaron was as critical of Mr. Hoover's performance as he was of yours. He terminated his employment at the same time that he terminated your employment because neither of you were meeting the established sales quotas of the company.

Your seventh allegation is that the respondent terminated your employment in an effort to avoid paying you a sizeable commission on a $2,500,000 acquisition by one of your clients. A review of your accounts indicates that the major account that you are referring to was the Department of Transportation (DOT). The acquisition by DOT was signed in June 1992, almost six months after your discharge. The total package sold to DOT between June and August 1992 amounted to $2,205,250.00; which was signed off by Mr. Aaron as the district manager.

Mr. Aaron states that in March 1992 it became necessary to revise and redraft your original proposal because the original did not meet the technical requirements of the contract. Mr. Aaron claims that he and the system engineer wound up including an additional EMC Symmetrix device; revised pricing for the added equipment, descriptions of the proposed IBM equipment and services; a revised estimate of equipment costs over the life of the equipment; and revised diagrams of the equipment. He stated that he revised the bid again during the best and final phase, and that the contract was awarded based on the revised bid that he submitted. Based on the information gathered it does not appear that there was an imminent sale that the respondent was attempting to cut you out of so that they could avoid paying you a commission.

Your last allegation is that prior to your termination you were not afforded the 90-day improvement plan that Mr. Monkelien was placed on. Mr. Aaron's justification for this difference is that, at the time that Mr. Monkelien's 90-day improvement plan was put into effect, he [Mr. Aaron] had just arrived into the position of district manager and had not had an opportunity to observe you and Mr. Monkelien working. Mr. Aaron states that he felt, since Mr. Monkelien had only made twenty-two percent of his 1990 quota, that he had to be put on notice. According to Mr. Aaron, he used the 90-day improvement plan as a means of warning Mr. Monkelien that his job was in jeopardy and that he was not satisfied with his performance. Mr. Aaron states that the 90-day period allowed him enough time to evaluate Mr. Monkelien's performance and make a decision about his continued employment.

Mr. Aaron states that he had a full year to observe your performance and he was not satisfied. He states that for this reason he did not need to utilize the same management tools he had used with Mr. Monkelien. Mr. Aaron points out that Mr. Hoover's employment was terminated after six months without the benefit of a 90-day improvement plan. You confirmed Mr. Hoover's termination and Mr. Hoover confirmed that he had not been placed on any kind of a 90 day plan. The Commission staff confirmed Mr. Aaron's statements to be true. In addition, the respondent's sales records indicate that in calendar year 1991 Mr. Newgaard produced $1,625,000 in revenues and Mr. Seder produced $919.000 in revenues. In comparison, you produced $671,000 in revenues and Mr. Hoover produced no revenues.

You stated that after you were discharged, Mr. Aaron hired two male sales representatives to replace you and Mr. Hoover. You believe this is evidence of sex discrimination. The Commission's investigation found that the two sales representatives that Mr. Aaron hired were Ms. Deborah Pietras and Mr. Paul Michaels, in June and July 1992 respectively. Both of these sales representatives were hired at a base salary of $40,000.00 per year; a nonrecoverable draw of $3,500 per month for three months; and a car allowance of $360.00 per month.

It is clear from the evidence that you and Mr. Hoover were the worst performers in the office. It appears that Mr. Aaron's action regarding your continued employment, although different from the action taken with Mr. Monkelien regarding his employment, was due to Mr. Aaron's management style. Mr. Aaron places high value on personal observation and evaluation. In Mr. Monkelien's case this was not possible, whereas in your case and that of Mr. Hoover, observation was possible. Therefore, I find insufficient evidence to believe that you were not provided with a 90 day improvement plan and terminated because of your gender.

In conclusion, the evidence cited above supports the respondent's position that their actions regarding your employment were not gender based. As a result, I find that there is insufficient evidence to support your allegations of sex discrimination against EMC Corporation.

The Fairfax County Human Rights Ordinance provides that you may appeal this decision before the Human Rights Commission. If you wish to schedule an appearance before the Commission to present an appeal. you must notify this office by June 10, 1994. If you do not appeal this decision, this letter will serve as the final decision of the Commission.

You also may elect to have the U.S. Equal Employment Opportunity Commission (EEOC) review this agency's final determination because your complaint was also filed under Title VII of the Civil Rights Act of 1964, as amended, which is enforced by the EEOC. To secure an EEOC review, you must request it in writing, within 15 days of your receipt of this agency's final determination. Your request for an EEOC review should be addressed to Ms. Susan Reilly, Director, U.S. Equal Employment Opportunity Commission, Washington Field Office, 1400 L Street. N.W., Suite 200, Washington, D.C. 20005. Otherwise, EEOC will generally adopt our action in your case.

If you have any questions, or if I can be of further assistance, do not hesitate to contact me.

Sincerely,
/s/
Michael T. Cash
Deputy Director

2178jm.lod

cc: Roy J. Bucholtz, P.C.
1801 Reston Parkway
Reston, Virginia 22090

APPENDIX J

Brief of Appellant EMC Corporation
in
Court of Appeals For The Fourth Circuit

Appendix A

Recent unpublished decisions of this Court in which the plaintiff failed even to meet the minimal burden of establishing a prima facie case of discrimination under *McDonnell Douglas/Burdine*:

Whitehead v. R.J. Reynolds Tobacco Co., No. 98-1821, 1999 WL 55391 (4th Cir. 1999); *Shabica v. Engineering Sales Assoc. of the Southeast, Inc.*, No. 97-2184, 1999 WL 17819 (4th Cir. 1999); *Middlebrooks v. University of Maryland*, 166 F.3d 1209 (Table), No. 97-2473, 1999 WL 7860 (4th Cir. 1999); *Harris v. General Motors Powertrain*, 166 F.3d 1209 (Table), No. 98-1394, 1999 WL 7865 (4th Cir. 1999); *Speedone v. Revco DS, Inc.*, 166 F.3d 1210 (Table), No. 98-1465, 1999 WL 5096 (4th Cir. 1999); *Fulwood v. Brown*, 166 F.3d 1209 (Table), No. 98-1505, 1998 WL 830648 (4th Cir. 1998); *Hackney v. Perry*, 166 F.3d 332, (Table), No. 97-2055, 1998 WL 801490 (4th Cir. 1998); *Ellis v. Officemax, Inc.*, 165 F.3d 910 (Table), No. 98-1509, 98-1862, 1998 WL 795174 (4th Cir. 1998); *Smith v. Budget Rent-A-Car Sys., Inc.*, 164 F.3d 625 (Table), No. 97-2496, 1998 WL 716036 (4th Cir. 1998); *Williams v. County of Fairfax*, 164 F.3d 628 (Table), No. 96-1109, 1998 WL 708694 (4th Cir. 1998); *Hubert v. Graphic Packaging Flexible Corp.*, 162 F.3d 1155 (Table), No. 98-1317, 1998 WL 558744 (4th Cir. 1998); *Brown v. Maryland-National Capital Park and Planning Comm'n*, 162 F.3d 1154 (Table), No. 98-1242, 1998 WL 539470 (4th Cir. 1998); *Bishop* *v. Hazel & Thomas, PC*, 151 F.3d 1028 (Table), No. 97-2284, 1998 WL 377912 (4th Cir. 1998); *Carroll v. Town of Univ. Park*, 155 F.3d 558 (Table), No. 97-2529, 1998 WL 390617 (4th Cir. 1998); *Hadrosek v. Paging Network, Inc.*, 155 F.3d 559 (Table), No. 96-2453, 1998 WL 390579 (4th Cir. 1998); *Brown v. Stafford County Pub. Schs.*, 151 F.3d 1028 (Table), No. 97-1552, 1998 WL 382731 (4th Cir. 1998); *Layfield v. Roadway Express Inc.*, 145 F.3d 1325 (Table), No. 97-1021, 1998 WL 279559 (4th Cir. 1998); *Reddy v. BDM Federal, Inc.*, 149 F.3d 1170 (Table), No. 97-1053, 1998 WL 252517 (4th Cir. 1998); *Bartee v. Morris*, 149 F.3d 1167 (Table), No. 97-1944, 1998 WL 252738 (4th Cir. 1998); *Kalm v. Dalton*, 141 F.3d 1158 (Table), No. 97-1921, 1998 WL 211940 (4th Cir. 1998); *Thomas v. Technical Resources, Inc.*, 141 F.3d 1160 (Table), No. 96-2733, 1998 WL 183835 (4th Cir. 1998); *Harris v. Prince George's County Pub. Schs.*, 141 F.3d 1158 (Table), No. 96-2785, 1998 WL 183837 (4th Cir. 1998); *Cabral v. Medical College of Virginia Hosp.*, 139 F.3d 888 (Table), No. 97-2299, 1998 WL 165781 (4th Cir. 1998); *Swerdloff v. Green Spring Health Serv., Inc.*, 139 F.3d 892 (Table), No. 97-2282, 1998 WL 165783 (4th Cir. 1998); *Brown v. Runyon*, 139 F.3d 888 (Table), No. 96-2230, 1998 WL 85414 (4th Cir. 1998); *Asuncion v. Southland Corp.*, 135 F.3d 769 (Table), No. 96-2702, 1998 WL 71529 (4th Cir. 1998); *McPhail v. Town of LaGrange*, 135 F.3d 770 (Table), No. 96-1269, 1998 WL 58168 (4th Cir. 1998); *Tolley v. Health Care and Retirement Corp., Inc.*, 133 F.3d 917 (Table), No. 96-2094, 1998 WL 24972 (4th Cir. 1998); *Kator v. Doctors Band*, 133 F.3d 915 (Table), No. 96-2539, 1998 WL 7942 (4th Cir. 1998); *Mosely v. Northern Virginia Community College*, 129 F.3d 1259 (Table), No. 96-2269, 1997

WL 716431 (4th Cir. 1997); *Spratley v. Hampton City Fire Dep't*, 125 F.3d 848 (Table), No. 96-2127, 1997 WL 592736 (4th Cir. 1997); *Thompson v. Kelso*, 122 F.3d 1063 (Table), No. 96-2224, 1997 WL 570870 (4th Cir. 1997); *Wade v. Norfolk Southern Corp.*, 121 F.3d 702 (Table), No. 96-2333, 1997 WL 526018 (4th Cir. 1997); *Wallace v. Shalala*, 112 F.3d 512 (Table), No. 96-2611, 1997 WL 199207 (4th Cir. 1997); *Leigh v. Elizabeth City Hous. Auth.*, 112 F.3d 509 (Table), No. 97-1244, 1997 WL 211989 (4th Cir. 1997); *Simmons v. Shalala*, 112 F.3d 510 (Table), No. 96-2838, 1997 WL 211285 (4th Cir. 1997); *Lewis v. Runyon*, 104 F.3d 359 (Table), No. 96-1845, 1996 WL 733936 (4th Cir. 1996); *Ryan v. West*, 99 F.3d 1131 (Table), No. 95-1869, 1996 WL 603250 (4th Cir. 1996); *Wooten v. Southern Bell Telephone & Telegraph Co. Inc.*, 98 F.3d 1336 (Table), No. 96-1480, 1996 WL 590582 (4th Cir. 1996); *Wooten v. Roche Biomedical Labs., Inc.*, 96 F.3d 1440 (Table), No. 95-2458, 1996 WL 515253 (4th Cir. 1996); *Jones v. Sprint Int'l*, 97 F.3d 1447 (Table), No. 96-1180, 1996 WL 558371 (4th Cir. 1996); *Karlinsky v. Mayor and Council of Rockville*, 96 F.3d 1438 (Table), No. 96-1340, 1996 WL 516147 (4th Cir. 1996); *Lanier v. MCI Telecomms., Inc.*, 95 F.3d 42 (Table), No. 95-3114, 1996 WL 482687 (4th Cir. 1996); *Nguyen v. Dalton*, 94 F.3d 642 (Table), No. 95-2269, 1996 WL 469904 (4th Cir. 1996); *Frazier v. Bentsen*, 92 F.3d 1178 (Table), No. 95-1290, 1996 WL 445090 (4th Cir. 1996); *Hsu v. West*, 92 F.3d 1179 (Table), No. 95-1667, 1996 WL 442896 (4th Cir. 1996); *Geary v. Levindale Hebrew Geriatric Ctr.*, 83 F.3d 414 (Table), No. 95-1918, 1996 WL 199539 (4th Cir. 1996); *Wilson v. Circuit City Stores, Inc.*, 81 F.3d 153 (Table), No. 97-2247, 1996 WL 145235 (4th Cir. 1996).

APPENDIX K

Brief of Appellant EMC Corporation
in
Court of Appeals For The Fourth Circuit
Appendix B

Recent unpublished decisions of this Court in which the plaintiff was wholly unable to rebut the defendant's legitimate, nondiscriminatory explanation for its employment decision:

Larebo v. Clemson Univ., No. 98-2234, 1999 WL 152863 (4th Cir. 1999); *Jackson v. Bd. of Educ. of Montgomery County*, No. 98-1060, 1999 WL 152588 (4th Cir. 1999); *Ward v. Eli Lilly and Co.*, No. 98-2153, 1999 WL 150768 (4th Cir. 1999); *Nguyen-Truong v. International Rehabilitation Assoc., Inc.*, No. 98-2213, 1999 WL 140745 (4th Cir. 1999); *Johnson v. Radio Shack/Tandy Corp.*, No. 98-1588, 1999 WL 125723 (4th Cir. 1999); *Coggins v. Gov't of District of Columbia*, No. 97-2263, 1999 WL 94655 (4th Cir. 1999); *Adams v. Henderson*, 166 F.3d 1208 (Table), No. 98-1598, 1998 WL 887004 (4th Cir. 1998); *Presley v. BellSouth Telecomms., Inc.*, 161 F.3d 3 (Table), No. 98-1016, 1998 WL 610873 (4th Cir. 1998); *Rodriguez v. Kantor*, 162 F.3d 1155 (Table), No. 97-1668, 1998 WL 546098 (4th Cir. 1998); *Fashina v. Chevy Chase, F.S.B., Inc.*, 153 F.3d 719 (Table), No. 97-2291, 1998 WL 468775 (4th Cir. 1998); *Coates v. Abbeville County*, 153 F.3d 719 (Table), No. 97-1681, 1998 WL 469178 (4th Cir. 1998); *Wright v. Renolds*, 153 F.3d 725 (Table), No. 97-2422, 1998 WL 416731 (4th Cir. 1998); *Daniel v. Wal-Mart Stores, Inc.*, 153 F.3d 719 (Table), No. 97-2645, 1998 WL 449015 (4th Cir. 1998); *Jakubiak v. Perry*, 153

F.3d 720 (Table), No. 97-2062, 1998 WL 449107 (4th Cir. 1998); *Johnson v. Runyon*, 151 F.3d 1029 (Table), No. 96-1920, 1998 WL 372473 (4th Cir. 1998); *Ellison v. First Citizens Bank & Trust Co.*, 149 F.3d 1168 (Table), No. 97-1623, 1998 WL 276273 (4th Cir. 1998); *Bunch v. Apfel*, 149 F.3d 1167 (Table), No. 96-1994, 1998 WL 276240 (4th Cir. 1998); *Roth v. Montgomery County, Md.*, 145 F.3d 1325 (Table), No. 97-1200, 1998 WL 196610 (4th Cir. 1998); *Bonner v. Payless Shoe Source*, 139 F.3d 887 (Table), No. 97-2401, 1998 WL 171342 (4th Cir. 1998); *Baker v. North Carolina Dep't of Commerce*, 139 F.3d 887 (Table), No. 97-1986, 1998 WL 168462 (4th Cir. 1998); *Moore v. JPS Automotive, L.P.*, 133 F.3d 916 (Table), No. 97-1278, 1998 WL 7935 (4th Cir. 1998); *Lee v. Wise County Sch. Bd.*, 133 F.3d 915 (Table), No. 97-1471, 1998 WL 10320 (4th Cir. 1998); *Knezevic v. The Hipage Co., Inc.*, 129 F.3d 1259 (Table), No. 97-1277, 1997 WL 722755 (4th Cir. 1997); *Rush v. Rowan-Salisbury Bd. of Educ.*, 127 F.3d 1100 (Table), No. 96-2462, 1997 WL 657128 (4th Cir. 1997); *Foster v. Sara Lee Intimates*, 113 F.3d 1231 (Table), No. 96-1332, 1997 WL 269356 (4th Cir. 1997); *Calloway v. Food Chief Convenience Store #38*, 113 F.3d 1231 (Table), No. 96-1892, 1997 WL 240849 (4th Cir. 1997); *Jones v. Cumberland County*, 110 F.3d 59 (Table), No. 95-2850, 1997 WL 161682 (4th Cir. 1997); *Williams v. Westwood One Radio Networks, Inc.*, 107 F.3d 869 (Table), No. 96-1666, 1997 WL 90656 (4th Cir. 1997); *Davis v. Reno*, 106 F.3d 390 (Table), No. 96-1398, 1997 WL 36995 (4th Cir. 1997); *Sonnichsen v. Sears, Roebuck and Co.*, 105 F.3d 648 (Table), No. 95-1866, 1997 WL 6972 (4th Cir. 1997); *Abood v. Atwood*, 103 F.3d 116 (Table), No. 96-1689, 1996 WL 671654 (4th Cir. 1996); *Cvijanovic v. Loral*

Corp., 96 F.3d 1438 (Table), No. 95-3147, 1996 WL 516157 (4th Cir. 1996); *Miller v. Thermalkem, Inc.*, 94 F.3d 641 (Table), No. 95-3174, 1996 WL 460767 (4th Cir. 1996); *Cranfill v. Winston-Salem Hous. Auth.*, 91 F.3d 129 (Table), No. 95-2907, 1996 WL 429297 (4th Cir. 1996); *Harris v. Rector and Bd. of Visitors of the Univ. of Virginia*, 83 F.3d 415 (Table), No. 95-1319, 1996 WL 199551 (4th Cir. 1996).

APPENDIX L

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 99-1149
CA-94-1693-A

JOAN H. BRAITSCH,

Plaintiff-Appellee,

v.

EMC CORPORATION,

Defendant-Appellant,

and

THOMAS AARON;
MICHAEL GRILLI;
FRANK KEANEY,

Defendants.

[Filed May 2, 2000]

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/
Patricia S. Connor
CLERK

Supreme Court, U.S.
FILED
AUG 31 2000
CLERK

No. 00-167

In the

Supreme Court of the United States

EMC CORPORATION,

Petitioner,

versus

JOAN H. BRAITSCH,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (App. 1a-2a) is not reported, but the judgment is noted at 210 F.3d 360 (4th Cir. 2000) (Table). The orders of the United States District Court for the Eastern District of Virginia denying EMC's request for an award of attorney's fees (App. 3a-6a, 10a-11a, 16a-17a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 2000. A timely petition for rehearing and rehearing en banc was denied on May 2, 2000 (App. 49a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(l).

STATEMENT OF THE CASE

I. Background

EMC specializes in manufacturing and selling computer equipment. Although EMC struggled during the late 1980's, since then it has become very prosperous to the point of reaching $1.2 billion in sales by 1994 and directly competing with IBM. Prior to 1990, EMC had marketed its products around the country through a network of sales offices and representatives. In 1995, EMC opened a District Office which targeted all the agencies and offices of the federal government located across the country, in addition to its regional offices.

From March 1990 through January 3, 1992, EMC employed Joan Braitsch to sell computer equipment to the federal government and related customers. When Mrs.

Braitsch was initially hired, she was orally offered a base salary of $40,000, but the written employment contract that EMC later produced provided a $35,000 base salary. Thus, her supervisor promised to correct the "paperwork" error so that her base salary would be increased to reflect the appropriate amount. EMC never corrected the error despite Mrs. Braitsch's attempts to follow up on the issue. After initial training in 1990, Ms. Braitsch began selling certain EMC products. However, it turned out that the products she had been hired to sell were being discontinued by EMC and thus there was insufficient existing business to generate $40,000 worth of commissions. Even though it was impossible for Mrs. Braitsch to meet her quota because the product lines she sold were being discontinued, she stayed with the company as a result of EMC 's offer to extend her draw and its assurances that there was no need to meet her quota. Mrs. Braitsch also decided to continue with EMC since it was about to start producing a new product line, the Symmetrix, which had the potential of generating large sales and commissions.

Notwithstanding the disappearance of the products she was assigned to sell and EMC's failure to correct the error in her pay, Mrs. Braitsch did well in 1990. During the last six months of 1990 she accumulated sales bookings in an amount in excess of $981,395. This figure included a $400,000 booking with the Drug Enforcement Agency ("DEA") for a Symmetrix which was ultimately never consummated due to a preexisting Department of Justice ("DOJ") contract with another vendor. However, Mrs. Braitsch was entitled to credit for the booking since, in 1990, EMC's compensation plan set quotas in terms of booking, not revenue. As a result of achieving her quota, for the second half of 1990 by such a wide margin, Mrs. Braitsch was eligible for the EMC 101 Club which provided special recognition for the most successful sales representatives. However, EMC failed to credit Mrs. Braitsch for all of her bookings.

Moreover, in addition to constantly changing Ms. Braitsch's territory, EMC allowed other sales representatives to sell in her territory despite a company policy against such "poaching." Thus, Mrs. Braitsch was often forced to share her commissions for sales in her own territory with other employees in the company who had not had any involvement in the sale. The men in her division, however, were not required to split their commissions. As a result of the non-refundable draw in 1990, however, this loss of commission did not affect her compensation. But, by denying her credit for sales, EMC was able to later say that she had failed to meet her quota. In 1990, however, she had been told that as a result of the discontinued product line she was not expected to meet her quota. Moreover, in the end of 1990, she was told that she "was doing a very good job," was being promoted to a different department, and would receive a higher base salary.

Just before Mrs. Braitsch was hired, EMC had hired Mr. Monkelien for $35,000 salary, with promises of $45,000 in a few months. This promise to the male salesman was $5,000 more than Mrs. Braitsch's promised increase. But Mr. Monkelien was not similarly situated with Mrs. Braitsch because things did not go as well for him.[1] In 1990, his sales only totaled $275,000. In addition, he was informed at the end of 1990, that his performance and professionalism were unsatisfactory and in accordance with company policy was being placed on a performance improvement plan. In April 1991, he was fired after failing to improve during his performance improvement period.

---

[1] The district court's finding that Mr. Monkelien and Mrs. Braitsch were similarly situated was not something that Mrs. Braitsch could necessarily have foreseen since Mr. Monkelien had less experience than Mrs. Braitsch and was cited for unprofessional behavior in 1990. Mrs. Braitsch's bookings were more than three times those of Mr. Monkelien and she was promoted at the end of 1990.

After an extension, both Mr. Monkelien's and Mrs. Braitsch's entitlement to a draw were scheduled to stop at the end of 1990. Mrs. Braitsch's draw was discontinued, while Mr. Monkelien was continued on a $2,000 per month draw in 1991 lasting until his termination.

II. Mrs. Braitsch's Claim that in 1991 EMC Paid Mrs. Braitsch Significantly less than Her Male Counterparts.

In 1991, Thomas Aaron became the District Director. Mr. Aaron hired several new salesmen, James Newgaard, William Hoover, and Lawrence Seder, all of whom were paid more than Mrs. Braitsch. Accordingly, during 1991, the sales staff for the Federal District received the following monthly compensation:

	Braitsch	**Newgaard**	**Seder**
Base Pay	$2,916.67	$3,333.33	$2,916.67
Draw	$0.00	$3,500.00	$3,000.00
Car Allowance	$325.00	$360.00	$360.00
Total	$3,241.67	$7,193.33	$6,276.67
Comparison to Braitsch		**221.90%**	**193.62%**

	Monkelien	Hoover
Base Pay	$2,916.67	$3,333.33
Draw	$2,000.00	$3,000.00
Car Allowance	$325.00	$360.00
Total	$5,241.67	$6,693.33
Comparison to Braitsch	**161.70%**	**206.48%**

III. Mrs. Braitsch's Claim that EMC Retaliated Against Her When She Complained about Discrimination.

By June 1991, Mrs. Braitsch became aware that she was being compensated less than the men and asked EMC, via her supervisor Mr. Aaron, to rectify the situation. Mr. Aaron promised her that the situation would be addressed, but no corrective action was taken. Several months later, she followed up with a letter to Mr. Aaron dated September 24, 1991. On October 14, 1991, she again followed up in writing as well as on November 4, 1991 without ever receiving a response. In November 1991, her territory was reduced. Consequently, she sent a memo to her superiors on November 3, 1991, expressing her views that the territory reduction was unfair.

Prior to November 10, 1991, Mrs. Braitsch had never been informed that her performance was unsatisfactory. However, by a memorandum dated November 11, 1991, Mr. Aaron accused her of unsatisfactory performance and unprofessional conduct. The allegations of unsatisfactory performance and conduct were purportedly based on the fact that she had not met her revenue quota and seven other allegations. As reflected below, Mrs. Braitsch had good reasons for believing that each of these allegations was false:

A. Expense Reports:

The allegation referred to reimbursement of Mrs. Braitsch for money that she expended in the course of her duties. Failure to submit reports on time meant only that she would not be reimbursed which, in turn, meant that EMC could retain money which was due to her. After being reminded in March 1991, Mrs. Braitsch submitted her expense vouchers within the specified time and she never received a subsequent reminder. Accordingly, there was no basis for the allegation in November 1991 of a lack of professionalism based on late expense reports.

B. Knowledge of USIA and Air Force Logistics Command:

Mrs. Braitsch was very much on top of both the USIA and Air Force Logistics Command contracts. In fact, the testimony of the USIA employee and Computer Specialist Richard Genders confirms that it was Mrs. Braitsch and not the commercial representative who was primarily responsible for sales to USIA. In this case, the commercial representative was allowed to "poach" in Mrs. Braitsch's territory and was given part of her commission in direct violation of company policy. Regarding the contract with the Air Force Logistics Command, Mrs. Braitsch worked with the local representative as provided by EMC policy to negotiate a sale with this customer. Therefore, EMC had no valid basis to criticize Mrs. Braitsch with regard to either contract.

C. Handling of DOJ/DEA Opportunity:

Mrs. Braitsch effectively marketed EMC's product to the appropriate person at DEA. Accordingly, there was no basis for a claim that Mrs. Braitsch was insensitive to the situation involving the DEA. This fact again shows that her supervisor criticized her without any basis in fact. Ultimately, top level people at the DOJ would not approve a sale due to a preexisting contract. However, she maintained a good rapport with DEA which could have been useful for future opportunities. Moreover, as with the other criticisms, this issue was never mentioned to Mrs. Braitsch until November 11, 1991 -- *after* she had pressed her complaints that she was being compensated less than her male counterparts.

D. Langley Air Force Base:

Another situation arose when Mrs. Braitsch was working with a local EMC representative who served Langley Air Force Base. Ordinarily, when a federal agency issued a Request for Proposal ("RFP"), EMC was required to submit a written proposal. It would be Mrs. Braitsch's function to prepare the proposal and submit it through the local representative. There are thousands of government offices which could be potential customers and Mrs. Braitsch had no means of keeping up with RFP's around the country. Therefore, it was the job of the local representative to identify the RFP. In this case, the local representative failed to inform Mrs. Braitsch about the Langley RFP. There was no basis for attributing that failure to Mrs. Braitsch.

E. Evaluation Units for 7th Communications Command:

Mrs. Braitsch had dealt with an Air Force Command in the Pentagon since 1976, and it was potentially a large customer. To interest the 7th Communications Command in a sale, Mrs. Braitsch sought to have the Command test the Symmetrix. However, 7th Communications Command's operation was so large that it required three Symmetrix's. Mrs. Braitsch included her regional manager Mr. Grilli in the process and he decided to place three systems in the command. In fact, this was a very sound decision in view of the opportunity presented. Thus, there was no basis for an allegation of poor performance against Mrs. Braitsch.

F. NSA Territory:

Mrs. Braitsch's supervisor faulted her for wanting to retain a prime customer, NSA, in her territory. The criticism is unfounded because it is based on the false claim that Mrs. Braitsch had previously agreed to give up this territory.

G. FBI Bid:

The allegation is based on the false claim that Mrs. Braitsch had failed to monitor and keep her supervisor informed about a bid to the FBI. In fact, she had "totally briefed" her supervisor concerning her efforts to make a creative sales approach to obtain the FBI business.

After she received the November 11, 1991, derogatory memo from EMC management, Mrs. Braitsch called Mike Grilli, EMC Southeast Regional Manager, to discuss the memo. Mr. Grilli told her not to do anything to get herself "in trouble." When Mrs. Braitsch explained to him that she was trying to obtain compensation parity with her male colleagues, Mr. Grilli responded that "EMC could pay anyone anything" it chose. To Mrs. Braitsch's claim that men and women must receive equal pay for equal work and that EMC should not violate the law, Mr. Grilli responded "watch me" (or words to that effect) and warned her that by making such complaints she risked getting herself into "trouble."

IV. Mrs. Braitsch Rejected EMC's Claim That She Was Fired for Failing to Meet Sales Quotas Because She Achieved the Highest Revenue for the Office in 1991 Sales.

Notwithstanding the manipulation of her territory and commissions, Mrs. Braitsch still was the most successful sales person in the office in 1991. Mr. Newgaard had only $39,000 in revenue in 1991.[2] Mr. Seder had about $900,000 in revenue, however, it all arose from one $800,000 sale, which had been arranged by Mr. Monkelien before he fired. Accordingly, Mr. Seder was not directly responsible for any sales. Mr. Hoover had no sales. While Mrs. Braitsch had more than $900,000 in revenue, which was still more than Mr. Seder even with the benefit of Mr. Monkelien's efforts.

Despite these facts, at the end of 1991 Mr. Newgaard got a raise. His base salary was increased to $60,000 a year and he was given an additional $2,000 a month draw which raised his total income to approximately $84,000. Mr. Hoover, who had only been with the company since August and had no sales was fired. Mr. Seder was retained at approximately the same circumstances in which he had been. Miss Braitsch was fired[3]

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[2] There is no basis for the district court's finding that Mr. Newgaard was subject to a "different [compensation] plan" because he was a first-year employee. In fact, EMC had one compensation plan that should have applied to all sales people.

The procedures at EMC provided for a performance improvement period prior to the initiation of an adverse personnel action. Clearly, this procedure was followed when Mr. Monkelien was fired. Later when Mr. Seder was fired, he was given a performance improvement period, but Mrs. Braitsch was not. Had she been given a performance improvement period, she would have still ranked first in the office because of sales which had been arranged as a result of her efforts for which revenue was received by EMC in 1992. In this regard, during 1992, EMC received nearly $4,000,000 in revenue as a result of her efforts as follows: Department of Transportation, $1,500,000; Air Force Logistics Command, $1,500,000; U.S. Postal Service $800,000; and Smithsonian Institute $60,000. Thus, Mrs. Braitsch would have been entitled to substantial commissions for these sales.

VI. Relevant Procedural History.

Mrs. Braitsch filed an administrative complaint and later a law suit which alleged that EMC had committed unlawful sex discrimination, harassment, and retaliation during the course of her employment and in her termination based on her observations that her employer, EMC Corporation and several of EMC's employees, were treating her unfairly by, among other things, paying her less than her male coworkers. Furthermore, when she was fired within weeks of complaining about both the pay inequity and other issues, she reasonably concluded that EMC had discriminated against her on the basis of her sex and retaliated against her for complaining of such discrimination.

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[3] The district court found that EMC's policy was to terminate people who did not make their goals in their second year. App. at 20a, see also 14a. However, there was no written policy or testimony upon which to base this conclusion.

Mrs. Braitsch initially brought her discrimination complaint before the Fairfax County Human Rights Commission, but the Commission denied her request for relief on May 27, 1994. Then, on December 23, 1994, she filed a complaint in district court, through counsel, alleging nine counts of sex discrimination against Defendant (and the individual employee defendants) pursuant to 42 U.S.C. §§ 2000e et seq. ("Title VII"), 29 U.S.C. § 206(d) ("Equal Pay Act"), and 42 U.S.C. § 1985 ("Civil Rights Act").

The district court granted defense motions to dismiss **some** of the counts against EMC and its employees on February 10, 1995. Later, the district court also dismissed one of Ms. Braitsch's Equal Pay Act claims but denied the rest of EMC's motion for summary judgment on March 24, 1995. EMC filed a second motion for summary judgment on July 28, 1995. Rather than ruling on that motion, the district court allowed plaintiff's allegations of Title VII employment discrimination and Equal Pay Act violations to go to trial on July 31, 1995. At trial, defendant's motion for judgment as a matter of law was granted and plaintiff's case was dismissed by the district court at the close of plaintiff's case-in-chief on August 1, 1995. The district court ruled on the sex discrimination claims, but did not expressly address either the remaining Equal Pay Act claim or the retaliation claim in doing so.

The district court's final Order was entered on August 4. Plaintiff filed her (amended) notice of appeal of the dismissal on August 8, 1995.

Defendant EMC filed its "Petition for Interim Attorney's Fees" on November 11, 1995. The district court exercised its discretion to deny Defendant's petition on December 12, 1995, finding that Plaintiff's case "was not frivolous, unreasonable, or without foundation." EMC did not appeal that order.

The Fourth Circuit Court, on September 12, 1996, affirmed the district court's dismissal of Plaintiff's case. Defendant then filed a second "Petition for Attorney's Fees" on November 29, 1996. The district court, on March 6, 1997, again denied the fee petition, repeating its finding that Plaintiff's case "was not frivolous, unreasonable, or without foundation."

Defendant EMC then appealed that decision raising essentially the same arguments raised in this petition but particularly suggesting that the district court may have based its denial of fees solely on the fact that defendant had been denied summary judgment. While the Fourth Circuit refused EMC's request that "guidance" be provided to the district courts requiring an award of attorney fees when a case was dismissed on summary judgment or pursuant to Rule 50, it nevertheless was compelled to remand the case to the district court to allay the concern that the district court may have based its denial of an award of attorney fees solely on the basis that plaintiff had survived summary judgment rather than a consideration of the record before it. App at 7a-9a.

On remand, Judge Hilton clearly followed the standard of *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421-22 (1978), which evaluates whether Ms. Braitsch pursued her case in a "frivolous unreasonable manner or without foundation," as the basis for his decision that plaintiff's claims were not frivolous and thus defendants were not entitled to attorney's fees. App. at 3a-6a. Appellant does not and cannot suggest that this is not the standard.

Additionally, Judge Hilton clearly stated his reasons for concluding that Mrs. Braitsch's case was not frivolous, unreasonable or without foundation -- that her male counterparts were paid a higher salary; that certain of her male counterparts were allowed to invade her territory without being punished; that her male counterparts received a higher car allowance; and that her manager rebuffed her when she complained of a violation of the equal pay laws. Appellant does not and cannot suggest that these findings were not supported by the record.

REASONS FOR DENYING THE WRIT

Pursuant to *Christiansburg Garment Co. v. Equal Emp. Oppt'y Comm'n*, 434 U.S. 412 (1978), the district court has discretion to award fees to a prevailing defendant in an employment discrimination case upon a finding that plaintiff's case was "frivolous, unreasonable or without foundation." There is no basis for abandoning this formulation in favor of a rule which requires that the district court award attorney's fees when a case, or a portion thereof, is dismissed on a dispositive motion.

Mrs. Braitsch brought her complaint based on facts which, under a reasonable interpretation of law, would have supported a prima facie case of sex discrimination and retaliation. The district court ultimately dismissed her claims at trial, but that court also exercised its discretion to deny the prevailing defendant's 1995 petition for attorney's fees. In its January 5, 1999 Order clarifying its denial, the district court applied *Christiansburg* and set forth cogent reasons for its finding that Mrs. Braitsch's case "was not frivolous, unreasonable or without foundation." This finding is entitled to deference and should not be set aside unless it is unsupported by the record. Moreover, the defendant has not cited any cases in which attorney's fees were provided to the defendant without the district court's determination that those claims upon which the fees were awarded were frivolous.

The cases cited by EMC in which the court awarded attorneys' fees for some claims, despite a finding that other claims were not frivolous, are distinguishable from this case in that the court actually held that the claims in question were frivolous and the finding was supported by evidence that there was no basis in law or fact for the involved claims.

Moreover, Mrs. Braitsch's claims against the individual defendants were dismissed early in the litigation, those defendants were not parties to the Fourth Circuit appeal, and are not parties to this petition for writ of certiorari. Thus, since Title VII provides the right to the prevailing party to claim attorney's fees, EMC's petition should not be granted to the extent it bases its petition on the claims of the individual defendants.

I. This Court's Holding in *Christiansburg Garment Co. v. EEOC* Does Not Support the Interpretation that a Prevailing Defendant in an Employment Discrimination Case Must be Awarded Attorney's Fees Simply Because a Case is Decided on a Dispositive Motion.

A. Congress's Primary Intent Regarding the Award of Attorneys' Fees to a Prevailing Party is to Promote the Vigorous Enforcement of Title VII Employment Discrimination Cases

The thrust of EMC's argument in favor of an award of attorney's fees for a prevailing defendant is that the federal court system is overwhelmed with employment discrimination cases and that "[f]ee awards to prevailing defendants [would] serve important policy goals recognized by Congress, such as deterring baseless litigation and ensuring that the fairness of the adversary process is not distorted 'by giving the plaintiff a disproportionate advantage with regard to fee entitlement.'" Pet. for Cert. at 9 (quoting *Independent Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 764 (1989)). This notion is simply wrong.[4] *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978) (stating that assessing fees simply because a defendant prevailed on the merits would "undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII").

This Court specifically reasoned in *Christiansburg* that "at least two strong equitable considerations" exist in support of an award of attorney's fees for a prevailing plaintiff in a Title VII action, which do not exist for a prevailing defendant. *Id.* at 418. First, a plaintiff, who is usually of limited means, should be readily awarded attorney fees since she is "the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.'" *Id.* at 418 (quoting *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968)). Second, when fees are awarded against a defendant it is because that party was found to have violated federal law. *See*

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[4] As a threshold matter, the promulgation of a new rule designed to deter discrimination cases is a legislative function. Therefore, EMC should take its policy arguments to its Congressperson. Moreover, EMC offers scant support for its suggestion that the district courts are being overwhelmed by discrimination cases. In this regard, data collected by the Administrative Office of the United States Courts reflect that the number of employment discrimination cases filed in 1997 decreased in 1998 so that the percentage of Title VII cases filed is stable at a range of 6.75% to 9.24% of the total civil cases filed in the district courts.

Christiansburg, 434 U.S. at 418. However, no such policy considerations are present when awarding attorney's fees to a prevailing defendant. *Id.* at 418-19. Thus, a prevailing defendant is only entitled to attorney's fees in situations where the district court has determined in its discretion that the plaintiff's action was frivolous, unreasonable, or without foundation. *See id.* at 421.

B. The Mere Fact that a Plaintiff is Aware of the Facts or Legal Principles Which Later Form the Basis for Dismissal on a Dispositive Motion Does Not Compel the Conclusion that Her Claims Were Frivolous, Unreasonable, or Meritless.

It is undisputed that a prevailing defendant should be entitled to attorney's fees for defending itself against a frivolous, unreasonable, or meritless claim. *See id.* at 421. However, this Court has held that "the term 'meritless' is to be understood as meaning groundless or without foundation, rather than simply that the plaintiff has ultimately lost his case." *Christiansburg,* 434 U.S.. at 421. Moreover, this Court has made clear that district courts should not engage in "post hoc reasoning" when considering whether attorney's fees are appropriate because occurrences during the course of litigation, may make a suit that was reasonable at its outset appear groundless in retrospect. *Id.* at 421-22. Thus, the standard to be applied when making the determination whether a prevailing defendant is entitled to attorney's fees is not, as suggested by the petitioner, whether "throughout the *entire* course of litigation the plaintiff was justifiably unaware of the facts or legal principles that ultimately resulted in dismissal." Pet. for Writ of Cert. at 10. This approach would involve the very post-hoc reasoning which the *Christiansburg* Court warned against.

EMC argues that attorney's fees should be awarded against Mrs. Braitsch, because she knew or should have known that her claims would be rejected as a matter of law before she even filed her lawsuit. *See* Pet. for Writ of Cert. at 11. However, this Court specifically stated in *Christiansburg* that

> [t]his kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.

Id. at 422. Thus, EMC's argument that Ms. Braitsch's §1985(3) conspiracy claims and her Title VII claims against her supervisors in their individual capacities were frivolous not does warrant a finding pursuant to *Christiansburg* that the defendant is entitled to attorneys' fees for prevailing on these claims. Clearly, the law in the Fourth Circuit has changed on numerous occasions since Ms. Braitsch filed her suit and thus she was justified in filing all plausible claims. Moreover, it is clear that in light of discovery Ms. Braitsch may have uncovered facts likely to support her claims. Similarly, EMC's argument that because Ms. Braitsch failed to survive a motion as a matter of law at the close of her case in chief based on the trial judge's determination that she had not sustained her burden to establish a prima facie case is irrelevant in the determination regarding attorneys' fees.

Clearly, Ms. Braitsch was reasonable in believing that she had been discriminated against and taking action to have her claims adjudicated. Moreover, it is extremely plausible that during the course of discovery her attorney would have discovered evidence to make out a prima facie case. To say that since she ultimately failed to do so is to partake of the very post hoc reasoning that this court warned against doing and would result in deterring Title VII litigation in its entirety except for the rare case involving a smoking gun.

This Court explained the difference between a lawsuit that is deemed "meritless" and one that is objectively "frivolous" and "groundless or without foundation" in *Hughes v. Rowe*, 449 U.S. 5 (1980). In *Hughes*, the district court had dismissed the plaintiff's civil rights action, deemed it "meritless," and awarded attorney's fees to the prevailing defendants. *Id.* at 5. The Seventh Circuit affirmed, but this Court vacated the award. *Id.* at 5-6.

Even though the plaintiff's complaint was dismissed for failure to state a claim (and deemed "meritless"), this Court found that plaintiff's allegations were "definitely not 'meritless' in the *Christiansburg* sense." *Id.* at 16. The plaintiff's civil rights allegations were meritorious enough to require judicial scrutiny and evaluation. "Even those allegations that were properly dismissed for failure to state a claim deserved and received the careful consideration of both the District court and the Court of Appeals." *Id.* at 15-16.

Mrs. Braitsch's complaint did not ultimately prevail, but it required full briefing of issues raised by motions and a partial trial before all of the causes of action were dismissed. As in *Hughes*, neither the district court nor the Fourth Circuit ever found Mrs. Braitsch's claims frivolous or groundless. *See Hughes*, 449 U.S. at 15 (no "finding" supported the fee award). At each stage of this litigation, Mrs. Braitsch's claims were reasonably supported by evidence and law. *Hughes*' ruling applies here: "Allegations that upon careful examination, prove legally insufficient to require a trial are not, for that reason alone, 'groundless,' or 'without foundation' as required by *Christiansburg*." *Id.* at 15-16.

The Court in *Equal Employment Oppt'y Comm. v. Reichhold Chemicals,* 988 F.2d 1573 (11th Cir. 1993) arrived at the *Hughes*' conclusion when applying *Christiansburg* in an analogous employment case. In *Reichhold Chemicals*, the EEOC filed a complaint that alleged employment discrimination and retaliation under Title VII and the EPA. *Id.* at 1565-66. The female complainant, a corporate staff accountant, had been receiving raises and favorable performance evaluations for several years. She found, however, that she was earning less than a similarly-trained male accountant although she had more responsibility. *Id.* at 1566-67. At one point, both she and the male accountant performed the same jobs, but the male received higher pay. *Id.* at 1567. When she filed an EEOC complaint challenging the disparate pay, her supervisors downgraded her performance evaluations and rejected her applications for internally-advertised positions. *Id.* at 1567-68.

At the close of plaintiff's case, the *Reichhold Chemicals* district court granted defendant employer's motion to dismiss and awarded defendant's attorney's fees. On appeal of the attorney's fee award, the Eleventh Circuit observed that the defendant had presented "convincing proof of non- discriminatory reasons" and had "defeated her claims on the merits." Nevertheless, without disturbing the district court's ruling on the merits, the Eleventh Circuit reversed the attorney's fees award because "the cumulative effect" and timing of the employer's actions were sufficient to "meet the plaintiff's initial burden." *Id.* at 1572.

The *Reichhold Chemicals* reasoning, which expressly follows *Christiansburg*, undermines EMC's position in this petition. EMC argues that because EMC provided substantial evidence to rebut Mrs. Braitsch's employment discrimination claims, Mrs. Braitsch's case then became frivolous. *Reichhold Chemicals* shows that even "convincing proof" of nondiscrimination, enough to warrant dismissal of the claim, is not sufficient ground to justify finding plaintiff's claim frivolous under *Christiansburg*.

Truly "frivolous" cases are those where plaintiffs "did not introduce any evidence to support their claims." *Sullivan v. School Bd. Of Pinellas County*, 773 F.2d 1182, 1189 (11th Cir. 1985) (collecting cases). The courts have held cases to be "frivolous" when there is an aggravating factor. For example, the Fourth Circuit found a plaintiff's civil rights action "frivolous" because (1) there was no basis in fact, (2) the evidence at trial was no more than "conjecture and speculation," and (3) the plaintiffs had a clear motive of revenge. *Hutchinson v. Staton*, 994 F.2d 1076, 1080 (4th Cir. 1993). In *Arnold v. Burger King Corp.* 719 F.2d 63, 66 (4th Cir. 1983), the plaintiff's case not only lacked evidence of discrimination, but the plaintiff had been fired because he sexually harassed female co-workers. In *Turner v. Sungard Business Systems, Inc.*, 91 F.3d 1418 (11th Cir. 1996), the prevailing defendant received attorney's fees because plaintiff's first attorney withdrew from plaintiff's case saying it was groundless, and plaintiff (and counsel) filed no opposition to defendant's motion for summary judgment because the case was so groundless. *Id*. at 1420, 1423.

By contrast, in *Sullivan*, *supra*, the Court held that plaintiff's employment and civil rights action was not so devoid of factual support as to be frivolous, even though "a clear preponderance of the evidence" favored the defendant. *Sullivan*, 773 F.2d at 1188.

The evidence may not have been sufficient to prove employment discrimination to a jury, but Mrs. Braitsch did provide facts and reasonable inferences to show that EMC was treating her unfairly, and quite plausibly it was because of her sex. The District court observed, even when justifying the dismissal under Rule 50 at trial, that "it may be that this plaintiff and Mr. Monkelien both were treated unfairly, in quotes, in that they were the first sales people that came on." App. at 19a. Later, the judge told the jury that subsequent salesmen made more money than Mrs. Braitsch and Mr. Monkelien, and "that may not be fair in the whole scheme of things, I don't know ..." App. at 21a.

The evidence suggested palpable unfairness in her situation, even to the judge who ruled against Mrs. Braitsch. Although she did not prevail ultimately, her claims were not frivolous.

II. The Basis on Which a Court May Award Attorney's Fees to a Prevailing Defendant Is Clearly Articulated in *Christiansburg* and There Is No Controversy in the Circuits Regarding this Formulation.

There are several reasons why EMC's claims that this case provides a proper vehicle for addressing a conflict in the circuits on should be rejected. First, there is no such conflict. Under *Christiansburg*, the issue of attorney's fees is committed to the discretion of the district court and a prevailing defendant is entitled to an award of attorney fees upon a finding that plaintiff's claims were "frivolous, unreasonable, or without foundation." 434 U.S. at 421. This Court's holding in *Christiansburg* does not leave room for dispute in the circuits upon this point and EMC has not cited a single case in any circuit where the Court of Appeals has held otherwise. With respect to Mrs. Braitsch's claims, the district court found that because -- her male counterparts were paid a higher salary; that certain of her male counterparts were allowed to invade her territory without being punished; that her male counterparts received a higher car allowance; and that her manager rebuffed her when she complained of a violation of the equal pay laws Mrs. Braitsch's claims were "not frivolous, unreasonable, or without foundation." App. at 5a. Because EMC could provide no basis for concluding that the district court's findings were not supported by substantial evidence, the Fourth Circuit granted summary affirmance under Fourth Circuit Local Rule 27(f) and dismissed EMC's appeal. See App. at 1a-2a. EMC has not cited a single case in any circuit where the Court of Appeals has found that a prevailing defendant should be awarded fees, notwithstanding a determination by a district court, based upon record evidence that plaintiff's action was "not frivolous, unreasonable, or without foundation."

The cases cited by EMC do not support its claim that there is a split in the circuit regarding the circumstances under which a prevailing defendant should be awarded attorney's fees. The petitioner has not cited a Fourth Circuit opinion in which the court failed to award attorney's fees even though the district court had found in its discretion that the plaintiff's claims were frivolous nor did the defendant argue that there was a split in the circuits while the issue was before the Fourth Circuit. Moreover, in each of the cases cited by the petitioner the district court specifically made a finding that the claim on which attorney's fees were awarded was frivolous based on the finding that the plaintiffs had failed to even allege the crucial elements of the frivolous counts. For instance the petitioner cited *Curry v. A.H. Robbins Co.*, 775 F.2d 212 (7th Cir. 1985), to support the proposition that "a prevailing defendant may be awarded fees incurred in defending against a frivolous claim or portion thereof, even if other claims asserted by the plaintiff were not frivolous." Pet. for Writ of Cert. at 15. However, the facts of *Curry* are clearly distinguishable from the situation involving Mrs. Braitsch's claims. In *Curry*, the plaintiff sued on various grounds resulting from physical and emotional injuries caused by a defective Dalcon Shield intrauterine device. *See id.* at 214. In addition to counts involving fraudulent misrepresentation and strict liability for her injuries, which were ultimately determined to be barred by the statute of limitations, Count III of her complaint was dismissed pursuant to an unopposed motion to dismiss. Count III alleged that the defendant's actions deprived the plaintiff of certain rights, including those provided by the Ninth and Fourteenth Amendments of the United States Constitution, based on the allegation that the defendant knowingly sold unsterilized Dalcon Shields to the United States Agency for International Development ("AID") which would ultimately create a health hazard for future users. *See id.* at 214. However, the plaintiff alleged that Count III was in violation of 42 U.S.C. § 1983 and never suggested that the claim should be brought under the Constitution or any other statute or treaty of the United States until after the petition for attorney's fees was made by the defendant. *See id.*

In its decision upholding the award of attorney's fees against the plaintiff for Count III of her complaint, the Seventh Circuit specifically stated that the district court had not abused its discretion in finding that the claim "was based on a violation of 42 U.S.C. § 1983 and that Curry failed to allege any conduct on the part of the defendants even arguably under color of state law as required by 42 U.S.C. § 1983" and thus was entirely without foundation. *See id.* at 219-20. Moreover, the Court of Appeals found that the plaintiff "apparently included a § 1983 claim in her complaint at least in part, in an attempt to claim attorney's fees under § 1988." *Id.* at 220 (mentioning that the plaintiff never even responded to the motion to dismiss). Thus, there can be no question that Count III was frivolous, unreasonable, or without foundation.

Similarly, in *Andrade v. Jamestown Housing Authority*, 82 F.3d 1179 (1st Cir. 1996), the Court of Appeals affirmed the district court's determination that the counts on which attorney's fees were awarded were frivolous. The plaintiff in *Andrade* failed to allege in her complaint "that her discharge was based on 'some racial or otherwise class-based invidiously discriminatory animus,'" in addition to conceding that the claim was facially defective. *Id.* at 1192 (quoting *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971)). Thus, there is no dispute that the claim was frivolous based on the failure to even allege the crucial elements of the claim. Moreover, in the same opinion the Court of Appeals noted its disagreement with the district court's finding that the plaintiff's intentional infliction of emotional distress claim was frivolous when brought. *See id.* at n.9. Clearly, the First Circuit follows the *Christiansburg* approach in which a claim is not frivolous simply because the plaintiff did not survive judgment as a matter of law. Furthermore, claims may be brought which may even "appear questionable or unfavorable at the outset" without warranting a finding of frivolousness. *Christiansburg*, 434 U.S. at 422.

In *Head v. Medford*, 62 F.3d 351 (11th Cir. 1995). the Court of Appeals noted that the plaintiff was an at-will employee and thus "had no cognizable federal constitutional right to due process or a claim for a taking." *Id.* at 356. Thus, her claim was frivolous and groundless. *See id.* at 356. In *Popham v. City of Kennesaw*, 820 F.2d 1570 (11th Cir. 1987), the Court of Appeals found that the district court had not abused its discretion in finding that the claims brought under the First Amendment against individual defendants were not frivolous and thus were not entitled to attorney's fees, although it remanded to the district court to determine whether the claims against the city defendant were frivolous. *See id.* at 1582-83.

Thus, in all the cases cited by the petitioner, a specific finding was made that the relevant claims were frivolous before any award of attorney's fees was made to the prevailing defendant. Moreover, in those cases where fees were warranted it was as a result of the plaintiff's failure to even satisfy the crucial elements of her claim so that upon any set of facts or any interpretation of the law the plaintiff could not possibly satisfy her burden. *See Andrade*, 82 F.3d at 1192 (stating that the plaintiff failed to allege that her termination was a result of racial animus as well as failing to allege that she belonged to a particular class of which the defining criteria were invidious); *Curry*, 775 F.2d at 219-220 (failing to allege any state action as required by 42 U.S.C. § 1983). Additionally, in several instances the court found that the allegation of a civil rights violation was brought merely to secure the ability to pursue attorney's fees upon a successful outcome. *See Curry*, 82 F.3d at 220 (stating that plaintiff apparently included the claim so as to attempt to collect fees).

The Fourth Circuit's refusal to award fees based upon EMC's argument that Ms. Braitsch was frivolous because some of the claims filed on her behalf were dismissed in an early motion is understandable since the decision as to which legal theories should be pleaded is one that was made by her attorneys. *See Shea v. Donohoe Const. Co., Inc.*, 795 F.2d 1071, 1077-78 (D.C. Cir. 1986) (Courts disfavor sanctioning a party for counsel's misconduct unless the party itself is somehow implicated); *see, e.g., In re Ruben*, 825 F.2d 977, 986 (6th Cir.1987), *cert. denied,* 485 U.S. 934, 108 S.Ct. 1108, 99 L.Ed.2d 269 (1988); *see also* Joseph, SANCTIONS § 27(A) at 436 ("a party cannot be taxed with the misconduct of his or her counsel absent evidence reflecting that the party participated in the misconduct"); *Gundacker v. Unisys Corp.*, 151 F.3d 842, 849 (8th Cir. 1998) (refusing to impute liability to client "because his attorney decided to 'run wild'"). In this regard, Mrs. Braitsch's attorneys deemed the claims against the individuals and the conspiracy claims to be valid claims, and filed oppositions and raised colorable defenses to the dispositive motions.

Moreover, if EMC believed that the attorneys had improperly advanced these claims, EMC or the individual defendants could have raised claims against Mrs. Braitsch's attorneys under Fed. R. Civ. Proc. Rule 11. However, they elected not to do so. In view of EMC's decision not to seek relief against Mrs. Braitsch's former attorneys, EMC should not be permitted to hold Mrs. Braitsch responsible long after those attorneys have departed from her case. Compare *Kaplan v. Zenner*, 956 F.2d 149, 151 (7th Cir.1992) (requests for sanctions must be filed "as soon as practicable after discovery of a Rule 11 violation").

EMC's approach now puts Ms. Braitsch in the position of justifying the actions of attorneys whom she discharged in June 1995, several months after the actions upon which EMC now bases its claims took place. However, in their defense, Title VII law, especially in the Fourth Circuit is in state of flux. In this regard, since Ms.

Braitsch's lawsuit was filed, Fourth Circuit approaches have been overruled by this Court on at least three occasions. *See Reeves v. Sanderson Plumbing Products, Inc.*, ___U.S. , 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000)(reversing *Theard v. Glaxo*, Inc., 47 F.3d 676 (4th Cir. 1995)) which articulated Fourth Circuit pretext-plus interpretation of *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511, 113 S.Ct. 2742, 125 L.Ed.2d 407(1993); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998) (overruling *Andrade v. Mayfair Management, Inc.*, 88 F.3d 258, 261-62 (4th Cir.1996)) which had applied the Fourth Circuit's negligence standard as the sole basis for imposing liability upon employers for abusive or hostile workplace discrimination; and *Robinson v. Shell Oil Co.*, 519 U.S. 337, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997) (*reversing Robinson v. Shell Oil Co.*, 70 F.3d 325(4th Cir. 1995)) where the Fourth Circuit had ruled that term "employees," as used in antiretaliation provision of Title did not apply to former employees.

Ms. Braitsch's law suit was filed years before *Ellerth* and *Faragher*, in which this Court clarified circumstances under which an employer was vicariously liable when it claims that sexual harassment by its managers violated company policy. Prior to that the Fourth Circuit had held that in a sexual harassment case the acts of a manager were ultra vires and, absent notice to top management, there was no basis for holding the employer liable. *See Andrade v. Mayfair Management*, Inc., 88 F.3d 258, 261-62 (4th Cir.1996)(illegal sexual harassment is an illegitimate corporate activity, beyond the scope of supervisors' employment). Had the Fourth Circuit extended this principle to acts of discrimination, plaintiff's conspiracy claims and claims against the individual might have been her only recourse. Thus, while those claims may have appeared "questionable or unfavorable at the outset," they were not necessarily frivolous given the constantly changing case law in this field.

Further, EMC has no standing to make a claim for attorney fees incurred on behalf of individual defendants who are not a party to this appeal. It is well established that only the prevailing party has standing to seek attorney fees under Title VII or § 1988. *See Soliman v. Ebasco Servs., Inc.*, 822 F.2d 320, 323 (2nd Cir. 1987) *cert. denied,* 484 U.S. 1020 (1988); *Keese v. Orr*, 816 F.2d 545, 546-47 (10th Cir. 1987); *Rainsbarger v. Columbia Glass & Window Co.*, 600 F. Supp 299 301- 02 (W.D. Mo. 1984). Mrs. Braitsch's claims against the individual defendants were dismissed early in the litigation. Her appeal did not even address the claims which had been made against the individual defendants. A motion for attorney fees was never submitted on behalf of these individuals. Accordingly, they are not parties to this petition. To the extent that EMC bases its petition on the claims of the individual defendants who are not parties to this appeal, those arguments should be rejected.

Finally, when Congress enacted Title VII, it made clear that an employee should be free to bring a complaint of discrimination without fear of retaliation. *See* 42 U.S.C. §2000e-3. This applies even if it the underlying discriminatory conduct is not proven. *Little v. United Tech.*, 103 F.3d 956, 960 (11th Cir.1997); *see also Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1140 (5th Cir. 1981) ("To effectuate the policies of Title VII and to avoid the chilling effect that would otherwise arise, we are compelled to conclude that a plaintiff can establish a prima facie case of retaliatory discharge under the opposition clause of [Title VII] if he shows that he had a reasonable belief that the employer was engaged in unlawful employment practices."), *cert. denied,* 455 U.S. 1000, 102 S.Ct. 1630, 71 L.Ed.2d 866 (1982). Really, EMC's current claims are nothing more than a mode of retaliation. Certainly, EMC has spent far more in pursuit of its claims against Ms. Braitsch than it truly could hope to recover. The claims against the individuals and the conspiracy claims were dismissed in early motions and the expenses for those motions could not have been very high. In pursuing its current claim for attorney fees, EMC has gone through three law firms, three denials by the district court, two appeals, a petition for rehearing en banc and now this petition. Since EMC cannot have an economic purpose for its obstinate pursuit of Ms. Braitsch, its only reason for doing so would have to be to punish her for suing. To grant the petition in this case would be to encourage EMC's spitefulness.

CONCLUSION

The petition for writ of certiorari should be denied.

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August 31, 2000

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No. 00-167

IN THE

Supreme Court of the United States

EMC CORPORATION,

Petitioner,

v.

JOAN H. BRAITSCH,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent's brief in opposition wholly fails to undermine the reasons for granting review set forth in the petition. This case implicates an existing and widespread circuit conflict regarding the propriety of defendants' fee awards when some of the plaintiff's claims are frivolous, and offers the Court an opportunity to provide much-needed guidance to the lower courts on the important and recurring question of the proper standards for awarding attorney's fees to prevailing defendants. Plenary review should be granted so that the Court may address these significant questions.

I. This Case Squarely Presents The Circuit Conflict Over The Question Whether Prevailing Defendants Are Entitled To Fee Awards As Long As At Least Some Of The Plaintiff's Claims Were Frivolous

Respondent provides no meaningful response to EMC's persuasive showing (Pet. 12-14) that her 42 U.S.C. § 1985(3) claims and her employment discrimination claims against individual supervisors were frivolous, and indeed were barred by controlling precedent at all times relevant to this case.[1] Moreover, Respondent is judicially estopped from disputing the frivolousness of those claims, because she has admitted in separate litigation against her former attorney that those claims were in fact frivolous. *See Bucholtz v. Braitsch*, Law No. 187385 (Va. Cir. Ct., Fairfax County), Amended Counterclaim at 2 ¶ 5 (alleging malpractice consisting of the "assertion of frivolous counts and theories in her attorney's filings" and "erroneously including certain individuals as named defendants"); *id.*, Opp. to Demurrer to Amended Counterclaim at 2 ¶ 3 ("assertion of frivolous counts, defendants and theories"). (Copies of these pleadings have been lodged with the Clerk for the Court's convenience.) Thus, it is incontrovertible that at least some of Respondent's claims in this case were frivolous, and accordingly the judgment of the court of appeals in this case is directly inconsistent with the decisions of other courts of appeals awarding attorney's fees to prevailing defendants in identical circumstances. *See* Pet. 15-17.

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[1] Respondent offers the halfhearted defense that "Title VII law, especially in the Fourth Circuit[,] is in [a] state of flux." Br. in Opp. 26. The cases cited by Respondent for this proposition (*id.* at 27) have absolutely nothing to do with the claims she asserted in this case, however, and there was and is no uncertainty or confusion regarding the utterly groundless nature of her claims at the time she brought this lawsuit and at all times thereafter. Indeed, this Court barred Respondent's § 1985(3) claims some five years before she asserted them, and the circuits were and are unanimous in barring Title VII claims against individual supervisors. Pet. 13-14 (citing cases).

Respondent's attempt to distinguish away the conflicting authorities cited in the petition is wholly unsuccessful. Respondent contends that in the cases cited by EMC "the district court specifically made a finding that the claim on which attorney's fees were awarded was frivolous based on the finding that the plaintiffs had failed to even allege the crucial elements of the frivolous counts." Br. in Opp. 23. But the presence or absence of a district court "finding" of frivolousness is beside the point, because all such determinations are reviewable on appeal. The ultimate question is whether one or more of the plaintiff's claims were frivolous, not whether the district court correctly determined that issue. In this case, as conclusively demonstrated above, at least some of Respondent's claims were unquestionably frivolous, for reasons that were evident on the face of Respondent's complaint when judged against the controlling legal authorities. Thus, the cases cited in the petition that award attorney's fees where only some of the plaintiff's claims are frivolous are squarely in conflict with the judgment below, which rejects a request for attorney's fees despite the undisputed fact that at least some of the claims asserted by Respondent were patently frivolous.

Respondent attempts to deny the significance of this issue by blithely asserting that the rule announced in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), "does not leave room for dispute in the circuits" and thus "there is no . . . conflict" among the authorities. Br. in Opp. 21, 22. As Respondent concedes, however, the courts in *Curry v. A.H. Robbins Co.*, 775 F.2d 212 (7th Cir. 1985), *Andrade v. Jamestown Housing Authority*, 82 F.3d 1179 (1st Cir. 1996), and *Head v. Medford*, 62 F.3d 351 (11th Cir. 1995), each held that defendants are entitled to fee awards when only some of the plaintiff's claims were frivolous. By contrast, as the petition demonstrates and as Respondent effectively concedes, at least two other circuits (in addition to the court below) have reached precisely the opposite conclusion. *See* Pet. 17-18. Those courts squarely reject fee awards for defendants forced to defend against some frivolous claims, reasoning that the plaintiffs' cases were not *wholly* frivolous—a rationale that obviously would have precluded fee awards in *Curry*, *Andrade*, and *Head*. *See, e.g.*, *Colombrito v. Kelly*, 764 F.2d 122, 132 (2d Cir. 1985) (plaintiff's suit not frivolous "[o]n the whole"); *Tarter v. Raybuck*, 742 F.2d 977, 987 (6th Cir. 1984) (plaintiff's case not "wholly" without foundation).

Nor can Respondent successfully explain away the conflict by attributing it to the discretion granted district courts under the *Christiansburg* test. The Second and Sixth Circuits were clearly ruling as a matter of law in categorically rejecting fee awards where only some of the plaintiff's claims are frivolous. *Id.*; *see Sommers v. Schaefer*, 849 F.2d 1474, 1988 WL 61500 at *2 (6th Cir. 1988) (Table) ("[I]t is error to award attorney's fees against a claimant when some, but not all, claims are frivolous.") (citing *Tarter*); *In re Ruben*, 825 F.2d 977, 987 (6th Cir. 1987) ("The adding of some meritless claims does not make the whole case frivolous."). Moreover, Respondent's apparent view that the courts of appeals in these cases were simply deferring blindly to the decisions of the respective district courts is factually unsupportable (as well as legally erroneous). In *Head*, for example, the Eleventh Circuit reversed the district court's *refusal* to award fees with respect to those claims that the court of appeals found to be frivolous, 62 F.3d at 356, whereas in *Tarter*, the Sixth Circuit reversed the district court's *award* of fees even though it agreed that some of the plaintiff's claims were "'patently without merit.'" 742 F.2d at 987 (citation omitted). Thus, these precedents cannot be reconciled in the manner suggested by Respondent, and are instead in direct conflict.

Respondent also contends that the court of appeals' failure to award fees is justified by the fact that "the decision as to which legal theories should be pleaded is one that was made by her attorneys." Br. in Opp. 26. Respondent's contention is predicated on the erroneous assumption that fee awards to prevailing defendants constitute sanctions for litigation misconduct. This Court has made clear that such fee awards are not sanctions for bad faith conduct, but are instead awards of costs that are intended to deter the bringing of frivolous claims and compensate defendants for the burdens imposed by such claims. *See Christiansburg*, 434 U.S. at 418-20. Accordingly, the law is clear that a plaintiff's reliance on the advice of counsel is no defense to a claim for attorney's fees under a fee-shifting statute. *See, e.g., Davidson v. Keenan*, 740 F.2d 129, 133 (2d Cir. 1984) ("in awarding attorneys' fees to defendant in a Title VII case, if a claim is groundless, the mere fact that the plaintiff relies on his attorney's erroneous contrary advice does not relieve him of liability"); *Durrett v. Jenkins Brickyard, Inc.*, 678 F.2d 911, 916 (11th Cir. 1982) ("the perception that counsel was primarily at fault in filing or maintaining a frivolous, groundless, or unreasonable claim should play no role in the decision whether to assess attorney's fees against the plaintiff in a Title VII case"); *Prate v. Freedman*, 583 F.2d 42, 47-48 (2d Cir. 1978).[2]

Respondent also errs in contending (Br. in Opp. 28) that EMC lacks "standing" to recover the attorney's fees it expended in defending its employees against her frivolous claims. The cases she cites in support of that argument are wholly inapposite, because they stand only for the unremarkable proposition that prevailing *parties*, and not their *attorneys*, have the right to recover a reasonable attorney's fee in employment and civil rights litigation. EMC is unquestionably the prevailing party in this case, and it therefore has standing to seek a fee award under the precedents cited by Respondent. The applicable statutes authorize the award of all "reasonable" attorney's fees to the prevailing party. 42 U.S.C. §§ 1988(b), 2000e-5(k). Respondent does not contend that it was unreasonable for EMC to incur attorney's fees in defending its employees against her frivolous claims, nor would there be any basis for such an argument. EMC is therefore entitled to recover those fees. *Cf. Collins v. Chandler Unified Sch. Dist.*, 644 F.2d 759, 763-64 (9th Cir. 1981) (award of fees to parents who litigated on behalf of minor does "not violate the letter or spirit of section 1988").

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[2] Of course, as the Eleventh Circuit observed in *Durrett*, in cases "in which the plaintiff's counsel may appear to be primarily culpable, the plaintiff may find relief from the effect of [this] rule in the form of a malpractice action." 678 F.2d at 916. As noted above (*see* p. 2, *supra*), Respondent has already brought a malpractice claim against the attorney who filed this lawsuit on her behalf, alleging that he improperly asserted frivolous claims in this case.

Accordingly, this case squarely presents the circuit conflict over the question whether prevailing defendants are entitled to fee awards as long as at least some of the plaintiff's claims are frivolous. The widespread division of authority over this question justifies this Court's review.

II. Review Is Also Warranted To Make Clear That An Award Of Attorney's Fees Is Required When A Plaintiff's Claims Fail As A Matter Of Law For Reasons That Were Or Should Have Been Apparent To The Plaintiff

As the petition compellingly demonstrates (Pet. 9-10), the federal courts are being subjected to a barrage of employment discrimination claims, many of them frivolous. Respondent suggests (Br. in Opp. 15-16) that this phenomenon is of no consequence, because the dramatic growth rate in such claims—which *tripled* between 1991 and 1998—may have temporarily leveled off and because, in Respondent's view, the single-minded goal of the fee-shifting statutes is to encourage the filing of employment discrimination claims at all costs. Needless to say, Respondent is mistaken.

As this Court made clear in *Christiansburg*, Congress expressly mandated that prevailing defendants would be entitled to fee awards in appropriate circumstances in order to "protect defendants from burdensome litigation having no legal or factual basis." 434 U.S. at 420. As shown in the petition, however, that salutary congressional goal has yet to be achieved, because the lower courts (including the court below) have transformed the *Christiansburg* standard into a license for civil rights plaintiffs to bring suit with impunity, secure in the knowledge that prevailing defendants will virtually never receive fee awards and that frivolous "strike" suits aimed at extracting nuisance settlements therefore make economic sense. This Court's guidance is necessary to provide manageable standards to ensure that the federal courts award fees to defendants in appropriate cases and thereby achieve Congress's goals in enacting these fee-shifting statutes.

Respondent's principal objection to the rule of law sought by EMC is that it would purportedly "involve the very post-hoc reasoning which the *Christiansburg* Court warned against." Br. in Opp. 16-17. In Respondent's view, awarding attorney's fees on the ground that she was always on notice of the facts and legal principles that compelled dismissal of her claims would be inappropriate because "in light of discovery [Respondent] may have uncovered facts likely to support her claims." *Id.* at 17.

Contrary to Respondent's belief, however, *Christiansburg* did not purport to immunize plaintiffs from fee awards when they file baseless discrimination claims in the vain hope that a fishing expedition might turn up evidence that they have no reason to believe exists. The "*post hoc* reasoning" forbidden by *Christiansburg* is the assumption that "because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." 434 U.S. at 422-23. Insisting that a plaintiff have a legitimate basis for bringing suit *before* she files her lawsuit, and awarding fees to the prevailing defendant when the plaintiff is on notice of the fatal factual and legal flaws in her case from the very beginning, are entirely consistent with *Christiansburg*'s observation that plaintiffs must have a "reasonable ground for bringing suit." *Id.* at 422.

Indeed, Respondent's contrary rule would effectively preclude fee awards to prevailing defendants in *all* cases, because it is always theoretically possible that the law could change or unsuspected evidence could be discovered. When, as here, such theoretical and wholly speculative possibilities do not become reality, the plaintiff's decision to file a lawsuit lacking any basis in fact or law compels an award of attorney's fees to the prevailing defendant. This Court's review is necessary precisely because many lower courts have effectively adopted Respondent's contrary rule.

Respondent's attempt to justify her assertion of groundless discrimination claims is wholly unsuccessful. The extensive recitation of "facts" set forth in the brief in opposition is barren of citations to the opinions or record below, and for good reason: It is riddled with inaccuracies and distortions, and bears only a passing resemblance to the actual record in the case. EMC will not waste this Court's time by engaging in an item-by-item refutation of Respondent's misleading factual assertions. The dispositive point, wholly undisputed by Respondent, is that she knew from the outset of the litigation that she could not establish a prima facie case of employment discrimination in the termination of her employment because she was replaced by another member of the same protected class. Pet. App. 6a, 13a; *see St. Mary's Honor Society Ctr. v. Hicks*, 509 U.S. 502, 506 (1993); *Brown v. McLean*, 159 F.3d 898, 905 (4th Cir. 1998); *see also Carter v. Ball*, 33 F.3d 450, 458 (4th Cir. 1994); *Blue v. United States*, 914 F.2d 525, 536 (4th Cir. 1990).

Similarly, Respondent was wholly unable to make out a prima facie case of discrimination in pay because, as was amply demonstrated by the administrative review conducted prior to the initiation of this lawsuit, she knew "that she was hired at the same compensation package as the other employee hired in 1990 (a male)" and that both male and female employees hired in 1991 received the same higher base salary. Pet. App. 14a, 20a, 24a-29a.[3] Thus, Respondent was or should have been fully aware of the undisputed facts that compelled dismissal of her claims under long-established and unchallenged principles of employment discrimination law. An award of attorney's fees should be required in such circumstances, and this Court should take this opportunity to make that principle clear to the lower federal courts.

Respondent relies on *Hughes v. Rowe*, 449 U.S. 5 (1980), but that case involved a pro se plaintiff, and the *Hughes* Court made clear that the standard it announced was limited to that context: "[T]he allegations of [a pro se prisoner plaintiff] . . . are held 'to less stringent standards than formal pleadings drafted by lawyers.'" *Id.* at 9 (citation omitted); *see id.* at 15. The lower courts have correctly read *Hughes* as announcing a special rule applicable only to the unique situation of pro se litigants. *Chester v. St. Louis Hous. Auth.*, 873 F.2d 207, 209 (8th Cir. 1989); *Miller v. Los Angeles County Bd. of Educ.*, 827 F.2d 617, 620 (9th Cir. 1987). Unlike the plaintiff in *Hughes*, of course, Respondent was represented by counsel throughout the course of this litigation, and she therefore cannot hide behind a rule designed solely for the benefit of pro se litigants.[4]

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[3] Respondent's salary comparison chart (Br. in Opp. 4-5) is egregiously misleading, because it ignores the undisputed fact that she (like her colleague Monkelien) could have elected to receive a "recoverable" draw in 1991 (*i.e.*, an advance against future commissions that was recoverable by EMC if the commissions were never earned). C.A. Jt. App. 274-75, 346; *see generally* Pet. App. 24a-26a (explaining EMC's draw policy and demonstrating that Respondent in fact received a *larger* draw than most of her male colleagues).

[4] Similarly misplaced is Respondent's reliance (Br. in Opp. 19-20) on *EEOC v. Reichhold Chemicals, Inc.*, 988 F.2d 1564 (11th Cir. 1993). In that case, unlike this one, the court held that the

Respondent's final contention—that EMC's request for this Court's review constitutes "retaliation," Br. in Opp. 29—is absurd. The questions presented in this petition involve an existing circuit conflict and a demonstrable need for guidance to the lower federal courts on an important and recurring issue. Review by this Court is therefore warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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plaintiff had in fact made out a prima facie case of sex discrimination and retaliation. *Id.* at 1570-72. Thus, *Reichhold* provides no support for the denial of fees here, where Respondent failed even to make out a prima facie case and was fully aware of the facts that barred relief at the time she filed suit. Indeed, in direct refutation of Respondent's contention that her inability "to establish a prima facie case is irrelevant to the determination regarding attorneys' fees" (Br. in Opp. 18), *Reichhold* confirms that a plaintiff's failure to make out a prima facie case is an important factor to be considered in the *Christiansburg* analysis. *Id.* at 1569 n.2.